Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KUEHNE & NAGEL, INC.,
Petitioner,

v.

MOTOROLA, INC. AND
FIREMAN'S FUND INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether in a case governed by the Warsaw Convention, a treaty of the United States, prejudgment interest may be awarded in excess of the limits prescribed in Article 22 of the Convention?

(2) Whether, in a case of partial damage to a shipment, the liability limits under Article 22 of the Convention should be calculated by reference to the weight of the entire shipment, and not the damaged portion alone, when no evidence has been introduced to prove that the value of the shipment was diminished or otherwise affected?

PARTIES TO THE PROCEEDINGS BELOW

(1) Petitioner KUEHNE & NAGEL, INC.

(2) Respondents MOTOROLA, INC. and FIREMAN'S FUND INSURANCE COMPANY

(3) FEDERAL EXPRESS CORPORATION

CORPORATE AFFILIATIONS

(1) KUEHNE & NAGEL, INC. is a member of KUEHNE & NAGEL GROUP, which is owned by KUEHNE & NAGEL INTERNATIONAL AG, SCHINDELLEGI, SWITZERLAND.

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**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Petitioner Kuehne & Nagel, Inc. ("KNI") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered October 16, 2002.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 308 F.3d 995 (9th Cir. 2002); App. 1a-28a.[1]

The opinion of the United States District Court for the Northern District of California is not officially reported. *See Motorola Inc. v. Federal Express Corp.*, 2000 U.S. Dist. LEXIS 16366 (N.D. Cal. November 2, 2000); App. 29a-32a.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on October 16, 2002. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

The articles of the Warsaw Convention[2] involved in this petition are Article 22(3) of the original, unamended Warsaw Convention, and Articles 22(2)(b) and 22(4) of the Warsaw Convention as amended by the Hague Protocol.[3]

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[1] References to the Appendix are indicated as App. ___a.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (note).

[3] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, Sept. 28, 1955, 478 U.N.T.S. 371.

Article 22(3) of the unamended Warsaw Convention provides:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs [$20] per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the consignor at delivery.

Article 22(2)(b) of the Warsaw Convention as amended by the Hague Protocol provides:

> In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

Article 22(4) of the Warsaw Convention as amended by the Hague Protocol provides:

> The limits prescribed in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by plaintiff. The foregoing provisions shall not apply if the amount of the damages awarded, excluding courts costs and other expenses of litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage or before the commencement of the action, if that is later.

STATEMENT OF THE CASE

Plaintiffs Motorola, Inc. ("Motorola") and Fireman's Fund Insurance Co. sued Federal Express Corporation ("FedEx") and KNI in the San Mateo Superior Court for damage to a shipment of cellular switching equipment carried from Dallas, Texas to Tokyo, Japan. Federal Express removed the case from the San Mateo Superior Court to the United States District Court, Northern District of California. Following a two-day non-jury trial, the district court entered judgment in favor of FedEx and awarded damages in plaintiffs' favor against KNI. The Ninth Circuit Court of Appeals affirmed the district court's judgment.

A. Nature of the Case

This is an action for damage to a portion of a cargo shipment carried in the course of international air transportation. The shipment at issue consisted of 38 crates of cellular switching equipment manufactured by Motorola. KNI, acting as Motorola's freight forwarder, arranged with FedEx for air carriage of the shipment from Dallas to Tokyo. FedEx carried the shipment from Dallas to Tokyo in a series of six flights. Upon delivery of the shipment in Tokyo, Motorola discovered that one of the crates had sustained damage. The total weight of the shipment was 12,204 kilograms. The weight of the damaged carton alone was 680 kilograms. The damaged carton contained a cabinet-like frame containing printed circuit board cards and wiring. Upon discovery of the damage to the carton, Motorola ordered a replacement frame, and it was shipped to Japan six weeks later. Installation of the cellular switching station in Japan was thereafter completed.

B. Proceedings Below

Plaintiffs' state court complaint alleged a cause of action for damage to cargo. FedEx removed the action from state court to federal court pursuant to 28 U.S.C. § 1331, on the grounds that the rights and liabilities of the parties to this action are governed exclusively by the provisions of the Warsaw Convention, a multilateral treaty governing the liability of carriers in the international transportation of goods by air. The district court conducted a two-day bench trial commencing October 24, 2000. The district court found that because plaintiffs had introduced no evidence that timely notice of claim had been provided to FedEx pursuant to Article 26 of the Convention, FedEx was entitled to judgment in its favor. The district court ruled that under the Warsaw

Convention, KNI was liable for the damaged cargo and awarded plaintiffs damages in the amount of $244,080.[4] In calculating this award, the district court did not apply the liability limit for the damaged portion of the shipment alone. Rather, the district court applied the "affected value" rule[5] as stated in *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 621 F. Supp. 721 (N.D. Ill. 1985), *aff'd* 855 F.2d 385 (7th Cir. 1988), which requires calculation of the liability limits by reference to the weight of the entire shipment, not just the damaged portion, when the damaged portion affects the value of the entire shipment. In a post-trial ruling, the district court awarded plaintiffs pre-judgment interest in excess of the Warsaw limits.

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[4] It is well-established that KNI, as a freight forwarder, is considered a "carrier" within the meaning of the Convention. *See Dazo v. Globe Airport Sec. Serv.*, 295 F.3d 934, 939 (9th Cir. 2002); *Kabbani v. Int'l Total Serv.*, 805 F. Supp. 1033, 1038-1039 (D.D.C. 1992); *Royal Ins. v. Amerford Air Cargo*, 654 F. Supp. 679, 682 (S.D.N.Y. 1987).

[5] Although it appears that the district court was attempting to apply the "affected value" rule of *Deere*, the district court incorrectly identified it as the "affected weight" rule. This misunderstanding almost certainly led to the erroneous conclusion reached by the district court that "[i]f it is shown at trial that the damaged parts caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the weight that will be considered under Article 22(2) is the total weight of the shipment." The Ninth Circuit has apparently made the same error in its analysis of the issue. 308 F.3d at 998-999; App. 8a ("The evidence suggests that the parties to the Hague Protocol understood the incorporation of the **affected weight** standard as a mere clarification of the Warsaw Convention . . . .") (*emphasis added*).

KNI appealed the district court's judgment to the Ninth Circuit Court of Appeals. On appeal, KNI argued that the district court erred in awarding plaintiff prejudgment interest and costs because these amounts exceeded the liability limits contained in Article 22 of the Warsaw Convention. KNI also argued that the district court erred in holding that the weight of the entire shipment, instead of the weight of the damaged portion alone, should be used to calculate the liability limits under Article 22 of the Warsaw Convention. While acknowledging that the Convention's text and drafting history are silent on these issues, the Ninth Circuit held that prejudgment interest in excess of the Warsaw limits may be awarded (1) to ensure that "the limited damages available to the successful claimant will not be eroded by the defendant's actions in delaying prompt resolution of the claim," 308 F.3d at 1005; App. 19a, and (2) to "foster speedy resolution of lawsuits under the Convention." 308 F.3d at 1006; App. 22a.

The Ninth Circuit also held that in cases of partial loss like this case, Article 22 of the Warsaw Convention incorporates the "affected value" rule, *i.e.* when damage to a portion of the shipment affects the value of the entire shipment, the Article 22 liability limits are calculated by reference to the weight of the entire shipment, not just the damaged portion alone. 308 F.3d at 1001-1002; App. 12a. The Ninth Circuit upheld the district court's application of the affected value rule in this case even though no evidence had been introduced showing any diminution in value of the shipment, or that the value of the shipment had been otherwise affected. *Id.* Accordingly, the decision of the Ninth Circuit affirmed the district court's judgment in its entirety.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve a direct conflict among the Ninth, Fifth, Second, and Seventh Circuits on the issue whether, in a case governed by the Warsaw Convention, prejudgment interest may be awarded in excess of the liability limits prescribed by the Convention. *See Motorola, Inc. v. Federal Express Corp.*, 308 F.3d 995, 1003-08 (9th Cir. 2002), App. 15a-28a; *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 263 (5th Cir. 1984); *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456, 460 (5th Cir. 1984); *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385, 391-92 (7th Cir. 1988); *O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842, 852 (2d Cir. 1984); *Exim Indus., Inc. v. Pan Am. World Airways, Inc.*, 754 F.2d 106, 109 (2d Cir. 1985). This Court has not squarely addressed the issue of prejudgment interest in the context of the Warsaw Convention. In *Eastern Airlines Inc. v. Mahfoud,* 474 U.S. 213, 106 S.Ct. 586, 88 L. Ed. 2d 522 (1985) this Court affirmed the Fifth Circuit's award of prejudgment interest in excess of the Warsaw limits. *Mahfoud*, however, was affirmed by an equally divided court, with Justice Brennan taking no part in the case. *Maufoud*, 474 U.S. 213, 106 S.Ct. 586, 83 L. Ed. 2d 27 (1985). As a result, seventeen years later, the Circuits still remain in conflict.

The Ninth and Fifth Circuits have concluded that prejudgment interest may be awarded in excess of the Warsaw limits in order to (1) foster speedy resolution of lawsuits and (2) to assure that the limited damages available to the successful claimant will not be eroded by the defendant's actions in delaying a prompt resolution of the claim. Neither of these reasons justify a departure from the express language of the Warsaw treaty, which this Court has previously held

must be strictly interpreted. *Chan v. Korean Air Lines Co. Ltd.*, 490 U.S. 122, 134, 109 S. Ct. 1676, 104 L. Ed. 113 (1989).

The fundamental error committed by the Ninth Circuit in this case was to ignore what this Court has identified as the preeminent purpose of the Warsaw Convention: to fix definite and uniform limits on the cost to airlines of damages sustained by their customers. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256, 104 S.Ct. 1776, 80 L. Ed. 2d 273 (1984). This purpose is inherently incompatible with a rule of law that allows prejudgment interest to be awarded at fluctuating rates, thereby making definite and fixed liability limits impossible. Moreover, in cases prosecuted in the state courts, differing rates of interest legislated by the states prevent any carrier from determining, in advance, what its limit of liability will be.

The decision of the Ninth Circuit also conflicts with a decision of a sister signatory, *see Swiss Bank Corp. v. Brink's-MAT Ltd.*, [1986] 2 Lloyd's Rep. 79, 101 (Eng. C.A.), which held that prejudgment interest is not permitted under the Convention.

The issues raised by this petition for certiorari are substantial, important and recurring, because the issue of prejudgment interest is present in virtually every case in which a claimant successfully establishes liability of the carrier. The jurisprudence in the circuits relating to the issue whether the Warsaw limits should be strictly applied, or whether they may be broken by an award of prejudgment interest, is in complete disarray, and unless the Court resolves the issue, every air cargo carrier, and the air cargo industry as a whole, will remain incapable of predicting the extent of its liability in cases governed by the Convention.

Additionally, the proper application of the affected value rule in Warsaw Convention cases transcends the facts of this case and represents an issue of exceeding importance in the air cargo industry, since it involves the fundamental question of how a carrier's liability limits are to be calculated under the Warsaw treaty. As discussed more fully below, certiorari should be granted to resolve these pressing and important issues.

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A DIRECT CONFLICT AMONG DECISIONS OF THE CIRCUIT COURTS OF APPEALS AND THE STATE COURTS

Article 22 of the Warsaw Convention establishes an air carrier's limit of liability of 250 francs per kilogram, which has been converted, by administrative order, to $9.07 per pound, or $20 dollars per kilogram in U.S. currency. Warsaw Convention Art. 22(2); 49 Stat. 3019; *Franklin Mint*, 466 U.S. at 247-249. This limit of liability was approved by the Court in *Franklin Mint*, 466 U.S. at 247. The Convention has no provision which addresses the subject of prejudgment interest.

The first court to address the issue whether the Warsaw Convention permits an award of prejudgment interest in addition to the liability limits set forth in Article 22 was the Fifth Circuit in *Domangue v. Eastern Airlines, Inc.*, 722 F.2d at 260-264. In *Domangue*, which involved a wrongful death claim arising from the crash of an Eastern Airlines Flight near JFK Airport in New York, the district court declined to award prejudgment interest in excess of the $75,000 limit established

by Article 22, as supplemented by the Montreal Agreement[6]. The district court noted that Senator Cordell Hull, in transmitting the Warsaw Convention to the Senate in 1934, stated that the purpose of the liability limitation contained in Article 22 was "to fix at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover their damages." 722 F.2d at 260. The district court also relied on the Second Circuit's decision in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922, 98 S.Ct. 399, 54 L. Ed. 2d 279 (1977), which held that "at no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters." 555 F.2d at 1089.

> In addressing the prejudgment interest issue, the Fifth Circuit acknowledged that the dominant objective [of the Convention] was to permit the growth of an infant industry by setting limits of liability. Such limits would make affordable insurance to protect air carriers. It would also subsequently decrease the cost of transporting passengers. That was the purpose referred to in Secretary of State Cordell Hull's message to the Congress, upon which the district court based its decision.

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[6] Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, Civil Aeronautics Board Order No. E-23680, 31 Fed. Reg. 7302 (1966), *reprinted at* 49 U.S.C. § 40105 note. The Montreal Agreement, by special contract which applied to flights having a point of contact with the United States, raised the original Article 22 liability limits for passenger injury or death ($8,3000) to $75,000.

722 F.2d at 261.

Nevertheless, the Fifth Circuit reversed the district court on the issue of prejudgment interest, holding that

> we must balance the objective of maintaining a fixed and definite level of liability with the objectives of encouraging the speedy compensation for damages and the maximum recovery for injured parties or their survivors. We find that the objectives of the Warsaw/Montreal legislation are well served by allowing the payment of post-judgment interest above and beyond the $75,000.00 limit to liability established by the Montreal Agreement.

722 F.2d at 262.

The Fifth Circuit went on to hold that even though the amount of interest awarded "may vary from case to case since cutting off the accumulation of interest due by settling, satisfying a judgment, or depositing the money into escrow is within the air carrier's control. . . ," the air carrier "cannot complain that its level of liability has been artificially inflated" because "the objective of encouraging the payment of judgments when the victim or his survivors most need help is furthered." 722 F.2d at 262.[7]

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[7] Subsequently, the Fifth Circuit extended its holding in *Domangue* to cargo claims. *Boehringer-Mannheim Diagnostics v. Pan Am World Airways*, 737 F.2d 456, 460 (5th Cir. 1984).

Two months after *Domangue* was decided, the Second Circuit Court of Appeals held in *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), a wrongful death case, that prejudgment interest in excess of the Warsaw limits was not permitted. 730 F.2d at 853. The Second Circuit held that

> [a]s a treaty adhered to by the United States, the Warsaw Convention is the supreme law of the land, and our duty is to enforce its provisions according to the intent of the framers. In the absence of any contrary intent on the part of the framers, we may not read into that document a provision that allows the payment of prejudgment interest above the $75,000 liability limitation.

730 F.2d at 853 (*citations omitted*). In *Exim Indus., Inc. v. Pan Am. World Airways*, 754 F.2d 106 (2d Cir. 1985), the Second Circuit extended its holding in *O'Rourke* to cargo cases, thus creating a direct conflict in the circuits on the issue whether prejudgment interest in excess of the Warsaw limits may be awarded in a Warsaw Convention cargo case.

Except for the Ninth Circuit, virtually all of the other federal courts that have considered the issue after *Domangue* have concluded that prejudgment interest in excess of the Warsaw limits is not allowed. *See Deere*, 855 F.2d at 391-92; *Commercial Union Ins. Co. v. Alitalia Airlines S.p.A.*, 2002 U.S. Dist. LEXIS 2978, *11 (E.D.N.Y. January 16, 2002); *Southern Elec. Distrib., Inc. v. Air Express Int'l Corp.*, 994 F. Supp. 1472, 1479 (N.D. Ga. 1998); *Corio Brothers Inv. Corp. v. Fast Air Carrier, S.A.*, 24 Avi. Cas. (CCH) 17,719,17,721-23 (S.D. Fla. 1993); *Hatzlachh Supply, Inc.*, 1989 WL 126094 *6 (S.D.N.Y. 1989). *But see,*

Mahfoud v. Eastern Airlines, 17 Avi. Cas. (CCH) 17,714, 17,717(D.C. La. 1982), *aff'd without opinion* 729 F.2d 777 (5th Cir. 1984), *aff'd by an equally divided court without opinion* 474 U.S. 213, 106 S.Ct. 586, 88 L. Ed. 2d 522 (1985). The Warsaw Convention commentators are in agreement with the majority of the federal courts, *see* 1 L. Kreindler, *Aviation Accident Law* § 12.07 (Supp. 2000) ("the better reasoned decisions hold that prejudgment interest is not recoverable if the result is to elevate the damages beyond the $75,000 limitation"), and a sister signatory has also held that prejudgment interest in excess of the Warsaw limits is not recoverable. *Swiss Bank Corp. v. Brink's-MAT Ltd.*, [1986] 2 Lloyd's Rep. 79, 101 (Eng. C.A.). The state courts of New York have followed the Fifth Circuit in allowing prejudgment interest. *Maro Leather Co. v. Aerolineas Argentinas*, 617 N.Y.S.2d 617, 620 (N.Y. App. Term. 1994), *cert. denied* 514 U.S. 1108 (1995); *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 508 N.Y.S.2d 865, 867 (N.Y. Civ. Ct. 1986).

In *Deere*, the Seventh Circuit reversed the district court's award of prejudgment interest in a Warsaw cargo case, holding that

> we are unpersuaded by the factors that influenced the district court, and reject the Fifth Circuit's position in favor of the Second Circuit's reasoning in *O'Rourke*. That case stressed that the preeminent purpose of the Convention was to fix definite and uniform limits on the cost to airlines of damages sustained by their customers. This goal is inherently incompatible with full compensation to all customers; making aggrieved airline customers whole is consequently not a primary purpose of the Convention. Prejudgment

> interest attempts to make a successful plaintiff whole by awarding him the time value of his money. It is an element of damages, which are explicitly limited by the Convention to a fixed, uniform, and knowable level.

855 F.2d at 391-392 (*citations omitted*).

The decisions on prejudgment interest in the federal circuit and state courts are in clear conflict. The Court should grant certiorari to resolve this conflict.

II

THIS CASE RAISES SUBSTANTIAL, IMPORTANT, AND RECURRING ISSUES INVOLVING THE CORRECT INTERPRETATION OF A TREATY OF THE UNITED STATES

Almost two hundred years ago, Justice Joseph Story set forth the fundamental principles of treaty interpretation:

> [T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops -

> whatever may be the imperfections or difficulties which it leaves behind.

The Amiable Isabella, 6 Wheat 1, 71, 5 L. Ed. 191 (1821). More recently, Justice Scalia expressed these principles more succinctly:

> We must thus be governed by the text -- solemnly adopted by the governments of many separate nations -- whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous. But where the text is clear, as it is here, we have no power to insert an amendment.

Chan, 490 U.S. at 134.

The Ninth Circuit's decision in this case ignores these longstanding principles of treaty interpretation, and substitutes its own view for the Warsaw framers on an issue of exceeding importance to the Convention: the proper limits of liability for cargo loss.

By allowing an award of prejudgment interest in excess of Article 22's liability limits, the lower court essentially grafted onto the Convention a provision that the Convention framers did not include. Moreover, by construing Article 22 to require application of the affected value rule in a case of simple delay, where no evidence at all was introduced on the value of the shipment (or how the value of the shipment was affected by the damaged portion), the lower court exploded carrier liability beyond that envisioned by the

Warsaw framers and made it impossible for any carrier to estimate its liability on any given shipment.

The issue of proper calculation of the Article 22 liability limits is a substantial, recurring issue which should be resolved by the Court. On September 28, 1998, the United States Senate ratified Montreal Protocol No. 4 ("MP4").[8] MP4 became effective as to the United States on March 4, 1999. By ratifying MP4, the United States became an adherent to the Hague Protocol of 1955.[9] *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423 (2d Cir. 2001) (Hague Protocol did not enter into force for the United States until MP4 was ratified by the Senate on September 28, 1998); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307 (2d Cir. 2000) (United States ratified MP4 and thereby acceded to the Warsaw Convention as amended by the Hague Protocol). The Hague Protocol amended Article 22 of the Warsaw

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[8] *See* Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955, Sept. 25, 1975, Message Transmitting Two Related Protocols, reprinted in S. Exec. Rep. No. 105-20, Art. XVII(2).

[9] Article XVII(2) of Montreal Protocol No. 4 provides that "[r]atification of this Protocol by any State which is not a party to the Warsaw Convention or by any State which is not a party to the Warsaw Convention as amended at The Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended at The Hague, 1955 and by Protocol No. 4 of Montreal, 1975." Montreal Protocol No. 4, Art. XVII(2), reprinted at S.Exec. Rep. No. 105-20.

Convention to expressly adopt an "affected value" standard.[10] Accordingly, the majority of cargo and baggage damages, losses or delays in international air transportation which occur after March 4, 1999 will be governed by the Warsaw Convention as amended by the Hague Protocol and MP4, and the issue of the proper application of the affected value rule in this case will provide the air cargo industry with valuable guidance on how the liability limits under MP4 and the Hague Protocol should properly be calculated.

In summary, the court below incorrectly decided recurring, important questions of treaty law on which the courts of the United States are in disarray. The proper interpretation of this treaty, which is a matter of importance to the courts, to the parties, and to the air cargo industry as a whole, should be reviewed and settled by the Court in order to ensure the uniform and proper application of this treaty and to end the conflict among the Ninth, Fifth, Seventh, and Second Circuit Courts of Appeal.

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[10] Article 22(2)(b) provides in pertinent part that "[i]n the case of loss or damage or delay of part registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the packages or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, **affects the value** of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability." Hague Protocol, Art. 22(2)(b) (*emphasis added*).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-17374

[Filed October 16, 2002]

MOTOROLA, INC., a corporation; FIREMAN'S FUND INSURANCE COMPANY, a corporation,
Plaintiffs-Appellees,

v.

FEDERAL EXPRESS CORPORATION,
Defendant,

and

KUEHNE & NAGEL, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding
D.C. No. CV-99-03659-WHA.

JUDGES:
Before: Stephen Reinhardt and Raymond C. Fisher, Circuit Judges, and Donald W. Molloy, District Judge.* Opinion by Judge Fisher.

OPINION

FISHER, Circuit Judge:

In this appeal, Kuehne & Nagel, Inc. ("K&N") challenges the district court's award of $ 244,080 and prejudgment interest to Motorola, Inc. Motorola brought claims under the Warsaw Convention arising out of damage to cargo sustained during transit from Texas to Japan after it hired K&N to transport the cargo. K&N principally contends that the district court erred in determining the liability limitation based on the weight of the entire shipment rather than only on the weight of the damaged component; that, in any event, the damaged portion of the shipment did not affect the value of the remainder of the shipment; and that prejudgment interest is not allowable under the Warsaw Convention. We disagree. We hold that Article 22 of the Warsaw Convention provides for liability limitation based on the entire weight of the shipment where, as here, the damaged portion of the cargo affects the value of the entire shipment. Additionally, we hold that prejudgment interest is available under the Warsaw Convention and that the district court properly awarded such interest to make full restitution to the injured party.

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* The Honorable Donald W. Molloy, Chief Judge, United States District Court for the District of Montana, sitting by designation.

FACTUAL AND PROCEDURAL HISTORY

Motorola, an electronics equipment manufacturer, hired K&N, an indirect carrier and freight forwarder, to transport a cellular telephone base station system, valued at almost five million dollars, from Dallas, Texas to Tokyo, Japan. Motorola hired another company, Relocation Services, Inc., to package the cargo into approximately 20 crates for shipping. K&N then arranged for Federal Express ("FedEx"), a direct air carrier, actually to transport the cargo via airplane to Tokyo. Between July 10 and 15, 1997, FedEx transported the cargo in a series of six flights. K&N issued a single air waybill covering the entire shipment and stating that there was no apparent damage to the cargo prior to transport. When the cargo arrived at the airport in Tokyo, K&N noted that a portion of the cargo was damaged. Upon receipt of the cargo, Motorola found that the damaged crate contained the system's cabinet-like common control frame, which consisted of printed circuit board cards and wiring. Motorola was forced to replace the equipment at a cost of $ 459,330.70 and waited six weeks for the replacement's arrival. The total weight of the shipment was 12,204 kilograms. The weight of the damaged crate was approximately 680 kilograms.

Motorola and Fireman's Fund Insurance Company, Motorola's insurance carrier, subsequently filed suit in California state court against K&N and FedEx, alleging breach of contract and negligence. After FedEx removed the case to federal court, K&N filed a cross-claim for indemnity and contribution from FedEx and all parties subsequently filed

for summary judgment.[2] The court granted partial summary judgment for K&N, finding the cargo suffered at least some damage while in FedEx's custody. Additionally, the court ruled that, under the Warsaw Convention, the liability limitation would be calculated according to the weight of the entire shipment -- and not just that of the damaged portion -- if Motorola proved at trial that the damaged portion of the cargo affected the value of the entire shipment.[3] The court left for trial the questions of whether the overall shipment was affected and the extent of damage done to the property.

The district court conducted a two-day bench trial. After Motorola presented its case, K&N rested without presenting any evidence. The court found in favor of

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[2] Prior to trial, K&N settled with FedEx and dismissed its cross-complaint.

[3] The parties incorporated this theory of calculation in a joint final pretrial order. The judge and counsel for all parties signed the order and agreed that certain legal issues were resolved by the summary adjudication order and on both the factual and legal issues to be resolved at trial. In that order, the parties agreed that the method for calculating damages was one of the legal issues that already had been resolved by the summary adjudication order:

> If it is shown at trial that the damage to the shipment rendered the entire system inoperable and caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the proper weight to be considered under Article 22(2) of the Warsaw Convention is the total weight of the shipment.

Motorola and awarded damages of $ 244,080, based on the weight of the entire shipment, and subsequently awarded Motorola prejudgment interest. On appeal, K&N challenges both damages and the award of prejudgment interest. We affirm on all counts.

DISCUSSION

I. Liability Limitations

A. Affected Weight Standard

The parties agree that this action falls within the parameters of the Warsaw Convention, an international treaty governing the liability that arises from the "international transportation of persons, baggage or goods performed by an aircraft for hire." *See* Warsaw Convention for the Unification of Certain Rules relating to International Transportation by Air, October 12, 1929, art. 1, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following *49 U.S.C. § 40105*. "The Convention creates a presumption of air carrier liability but, in turn, substantially limits that liability." *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 917 (9th Cir. 1999); *see Dazo v. Globe Airport Sec. Svcs.*, 295 F.3d 934, 937-38 (9th Cir. 2002). The Convention sets forth uniform rules of liability for loss, damage or delay of international shipments by air, and embodies a trade-off between the interests of carriers and shippers. Among its provisions is the rule that cargo carriers are entitled to a limitation of liability based on the weight of the shipment, presently set at $ 20 per kilogram. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 255, 80 L. Ed. 2d 273, 104 S. Ct. 1776 (1984);

Warsaw Convention art. 22. The relevant section of Article 22 provides:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs [$ 20] per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

Art. 22(3).[4] The Convention preempts state and federal claims falling within its scope. *See id.* at art. 24 (stating that claims for personal injuries, for damage to, or loss of, baggage or goods and for damages occasioned by travel delays, "however founded, can only be brought subject to the conditions and limits set out in this convention.").

K&N argues that the liability limitation should be calculated based only on the weight of the damaged portion of the shipment. Motorola maintains, and the district court agreed, that the defendants' liability limitation under the Convention should be calculated based on the weight of the entire shipment, approximately 12,204 kilograms, and not

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[4] Citations in this opinion are to the official United States translation of the Convention. *See* 49 Stat. 3014-23.

simply the weight of the damaged crate, approximately 680 kilograms.[5] The text and drafting history of the Warsaw Convention are silent on this question. Accordingly, we may look to, among other things, evidence of the postratification understanding of the Convention's contracting parties to determine whether the Convention includes the "affected weight standard." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167, 142 L. Ed. 2d 576, 119 S. Ct. 662 (1999); *Chan v. Korean Air Lines*, Ltd., 490 U.S. 122, 134, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989); *Hosaka v. United Airlines*, 2002 U.S. App. LEXIS 19176, [Slip Op. 14271, 14281-82 (9th Cir. 9/18/02)].

Under the 1955 Hague Protocol, which amended the Warsaw Convention, the affected weight standard is made an explicit part of Article 22.[6] It states:

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[5] We review a district court's interpretation of treaties de novo. *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000), *aff'd*, 533 U.S. 262, 150 L. Ed. 2d 326, 121 S. Ct. 2135 (2001). We review the district court's findings of fact for clear error. *See Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001).

[6] The treaty is formally known as the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, Sept. 28, 1955, 478 U.N.T.S. 371. The Hague Protocol did not enter into force for the United States until the Montreal Protocol No. 4 was ratified by the Senate on September 28, 1998 and became effective on March 4, 1999 -- after the shipment at issue here. Accordingly, the Hague Protocol does not govern here, but we look to it as an amendment to the Warsaw Convention that may provide insight into the shared understanding of the Warsaw

> In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, *when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability*.

Article 22(2)(b) (emphasis added).

The evidence suggests that the parties to the Hague Protocol understood the incorporation of the affected weight standard as a mere clarification of the Warsaw Convention or, at any rate, that they understood the new language to be no less advantageous to the shipper than existing Warsaw Convention language. The minutes of the Hague Protocol say nothing to suggest that the new language expressly articulating use of the affected weight standard substantively changed the Convention. The carriers' own representative, the International Air Traffic Association, did not argue that the amended version substantively changed Article 22 by increasing the carriers' liability, only that it "had reached the

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Convention's contracting parties.

conclusion that there was ambiguity in the present Convention as to problems of settlement for partial loss." *See* International Conference on Private Air Law: Vol. I, Minutes of Twentieth Meeting, Sept. 19, 1995 at p. 252. Moreover, the United States delegation opposed the amended version, and voiced its preference for the unamended version, because it believed the new version reflected a *decrease* in carriers' liability under Article 22. The delegation interpreted the unamended version to "mean that when a passenger or shipper lost one of a number of articles being carried, he would think that he had available to him the entire liability of the carrier as determined by the total weight of the articles." *Id.* In hearings before the United States Senate Foreign Trade Committee on the Hague Protocol, the Federal Aviation Administration's acting administrator for International Aviation Affairs testified that with respect to changes in liability limitation, "there isn't any change between . . . the Warsaw Convention and the Hague Protocol with respect to rates of recovery." *See* Hague Protocol to Warsaw Convention: Hearings Before the Senate Comm. on Foreign Relations, 86th Cong., 1st Sess. 22 (1965). Given this history, we conclude that the additional language created by the Hague Protocol only clarified, and certainly did not expand, carrier liability with respect to the affected weight standard. The Hague proceedings evince that the contracting parties to the Warsaw Convention understood in 1955 that existing Article 22 incorporated -- or, at the very least, was not hostile to -- the affected weight standard.

Consistent with the understanding manifested at The Hague, federal courts to have considered this question have understood that the Warsaw Convention incorporates the affected weight standard. In *Deere & Co. v. Deutsche*

Lufthansa Aktiengesellschaft, 621 F. Supp. 721 (N.D. Ill. 1985), *aff'd*, 855 F.2d 385 (7th Cir. 1988), a case much like this one, a computer system sustained damage during transport. The district court considered "whether [defendant's] liability under Warsaw Convention Article 22(2) must be calculated with reference to the entire weight of the shipment or with reference only to the weight of the package specifically damaged." 621 F. Supp. at 721. A damaged "director frame" -- a major component of the system -- had rendered the computer system as a whole inoperable for several months, until a replacement could be acquired. Thus, the damage affected the value of the entire computer system. *Id.* The court calculated damages based on the total weight of the shipment, reasoning that the entire system was valueless without the damaged component. *Id.* at 722.[7] Other courts

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[7] In a prior memorandum opinion granting partial summary judgment, the district court in *Deere* had found: "If the damage to the director frame affects the value of the entire computer, Lufthansa's liability must be calculated with reference to the weight of the entire computer shipment." *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, No. 81-C4726 (N.D. Ill. Aug. 8, 1984). The court erroneously relied on the affected weight standard as set forth in the Hague Protocol's proposed amendment of Article 22, apparently in the mistaken belief the Protocol had been ratified by the United States at that time. The defendant did not seek to correct the court's mistake until the case was on appeal. The Seventh Circuit, however, did not reach the merits of the affected weight standard: "We express no opinion on the merits of the argument [that the affected weight standard is inapplicable under the Warsaw Convention], because Lufthansa has waived it by not presenting it to the district court." 855 F.2d at 389. Nevertheless, as discussed in text, other courts have relied on *Deere* for the proposition that the affected weight standard is proper even under

have accepted this proposition. *See, e.g., Arkwright Mut. Ins. Co. v. KLM Royal Dutch Airlines*, 1995 U.S. Dist. LEXIS 11726 at 22, 1995 WL 491490, (S.D.N.Y. Aug. 17, 1995) ("The damage [in *Deere*] affected the value of the entire computer, and not just the part itself. Here, the lost container of pills had no effect on the value of the other four containers. . . . When lost goods comprise less than the entire shipment, and the remainder of the shipment is suitable for its intended use, the measurement used is the actual weight of the lost . . . goods, not the weight of the entire shipment") (internal quotation marks and citations omitted); *Williams Dental Co., Inc. v. Air Express Int'l*, 824 F. Supp. 435, 443 (S.D.N.Y. 1993)("When the lost or damaged goods constitute less than the entire shipment, the Warsaw Convention's liability limitation applies to the actual weight of the lost or damaged goods, not the weight of the entire shipment. Recovery based on a shipment's gross weight is permitted only when damage to a portion of a shipment affects the value of the entire shipment.") (citations omitted), *aff'd*, 17 F.3d 392 (2d Cir. 1993); *B.R.I. Coverage Corp. v. Air Canada,* 725 F. Supp. 133, 139 (E.D.N.Y. 1989) ("When, as in the instant case, only a portion of a shipment of goods is damaged, and the remainder of the shipment is suitable for its intended use, recovery is based on the weight of goods actually damaged. Recovery based on a shipment's gross weight is permitted only when damage to a portion of a shipment affects the value of the entire shipment.") (citations omitted); *Cf. Hartford Fire Ins. Co. v. Trans World Airlines, Inc.*, 671 F. Supp. 693, 694 (C.D. Cal. 1987) (Tashima, D. J.)(limiting damages to items "actually lost or damaged" but

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the unamended version of Article 22.

citing *Deere* for proposition that "damage limitation calculated on basis of weight of entire shipment where damaged item affected value of entire shipment").

We think this understanding is sound. In light of the view of the Warsaw Convention reflected by the Hague Protocol and the rulings of other courts, we hold that, when a portion of a shipment is damaged in transit, the liability limitation under the Convention is based on the weight only of the damaged portion; but when the damaged portion affects the value and usability of other parts of the shipment, the liability limitation is based on the weight of all affected items in the shipment.

B.Standard as Applied to this Case

Here, the district court found that the cellular base station "could not function at all" without the damaged control frame, concluding that the damaged component rendered the system "inoperable, useless and of diminished value." The court further found that little or no assembly could begin until the damaged control frame was replaced because it constituted the "heart and soul of the overall system and had a critical and central role in the overall system." Acknowledging that there was no direct evidence that the six-week delay in obtaining the replacement actually delayed the timetable for installation of the entire system, the court nevertheless determined that "a legitimate and reasonable inference can be drawn . . . that the actual assembly was, in fact, delayed in this case by the length of time it took to get the replacement, meaning six weeks." K&N argues that the district court clearly erred in finding that the damaged control frame caused a delay in the installation of the station and

thereby affected the value of the entire shipment. K&N contends that Motorola presented no evidence that the damage and resulting delay in construction in any way lowered the system's value and asserts that the proper liability limitation should therefore be based on the weight only of the control frame.

In making its factual findings, the district court relied on the testimony of Motorola project manager and engineer Gary Koepke. Koepke testified that it was not possible to construct the remainder of the station while awaiting the arrival of the replacement control board: "In some cases that's possible, but not with this one because this is one of the fundamental pieces. We have to start out with this one and before others at the very beginning and get that installed . . . . We can't do it later. It's the foundation for the rest of it." He stated that although "a couple of other frames" could be assembled, that process would take only one or two days "and then, you would have to stop and wait [for the control frame]." Koepke testified that a six-week delay in receiving the component -- although a "quick" time frame in which to obtain a replacement -- normally would delay installation of the entire system by six weeks. K&N offered no evidence to refute Koepke's testimony. The district court did not clearly err in relying on Koepke's expert testimony and finding that the damage to the control frame affected the value and operation of the entire base station. Accordingly, the court properly determined that the liability limitation here must be based on the weight of the entire cellular base station, not only on that of the damaged control frame.

C.K&N's Other Arguments

K&N offers two other reasons for avoiding or limiting its liability, neither of which is persuasive. First, we do not accept K&N's argument that, by contracting with FedEx to transport the cargo, K&N effectively carried out its duty to take all necessary measures to avoid damage as required by Article 20 of the Convention. Forwarders, such as K&N, assume the responsibility of a carrier, who actually executes the transport, even though the forwarder does not carry the merchandise itself. *DHL Corp. v. Civil Aeronautics Bd.*, 584 F.2d 914 (9th Cir. 1978). "Article 20 requires of defendant proof . . . of an undertaking embracing all precautions that in sum are appropriate to the risk." *Mfr. Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964, 967 (S.D.N.Y. 1977). The record does not contain any evidence that K&N took all necessary measures to avoid damage to the cargo. In fact, K&N failed to even offer any such proof at trial.

Second, K&N argues that its air waybill, which serves as the bill of lading for goods transported by air, prescribed the amount of damages available to Motorola. K&N's air waybill included the following provision: "In cases of loss, damage or delay of part of the consignment, the weight to be taken into account in determining carrier's limit of liability shall be only the weight of the package or packages concerned." Although Article 33 of the Convention allows carriers to make "regulations which do not conflict with the provisions of this convention," Article 23 specifically states that "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void." To the extent that K&N's air waybill provision may fix a lower liability limit here,

where the damaged portion affected the entire shipment, the provision conflicts with and is null and void under Article 23.

II. Prejudgment Interest

The district court awarded Motorola prejudgment interest in addition to the liability damages. The combined dollar amount of the award including such interest thus exceeded the liability limitation allowable under the Convention. The Convention does not discuss prejudgment interest and provides only for an amount calculated by multiplying the weight of the cargo by the dollar per-unit-of-weight multiple. We have not previously addressed the availability of a prejudgment interest award under the Convention. We conclude, however, that the award of prejudgment interest is consistent with the purposes of the Warsaw Convention and with postratification understandings of the treaty's contracting parties.

A.

Other courts to have considered this question have arrived at differing conclusions. In *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), the Fifth Circuit held that prejudgment interest on damages could be awarded in a wrongful death claim brought under the Convention and the Montreal Agreement of 1966.[8] After reviewing both the

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[8] The Montreal Agreement is a private pact among airlines that was approved by the United States government, *see 31 Fed. Reg. 7302* (May 13, 1966); it raised the cap on damages for passengers from $ 8,300 to $ 75,000. *Carey v. United Airlines*, 255 F.3d 1044, 1047 n.9 (9th Cir. 2001). The Montreal

Warsaw Convention and the drafting history of the Montreal Agreement, *id.* at 261 64, the court concluded that "allowing victims a more adequate recovery and ensuring speedy disposition of claims were important objectives leading to modification of the Warsaw Convention by the Montreal Agreement," and thus that "awarding prejudgment interest is permissible under the Warsaw/Montreal body of law . . . ." *Id.* at 263. Subsequently, the Fifth Circuit applied *Domangue* to a Warsaw Convention cargo liability claim, upholding an award of prejudgment interest "under the Convention itself." *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 460 (5th Cir. 1984), *appeal dismissed and cert. denied*, 469 U.S. 1186, 83 L. Ed. 2d 959, 105 S. Ct. 951 (1985). New York state courts have agreed with this view. *See Maro Leather Co. v. Aerolineas Argentinas*, 161 Misc. 2d 920, 617 N.Y.S. 2d 617, 620 (N.Y. App. Term. 1994) (awarding prejudgment interest in a case involving the loss of goods under the Convention), *cert. denied*, 514 U.S. 1108, 131 L. Ed. 2d 850, 115 S. Ct. 1958 (1995); *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc. 2d 858, 508 N.Y.S. 2d 865, 867 (N.Y. Civ. Ct. 1986).

On the other hand, two other circuits in this country and an English court have reached the opposite conclusion. In *O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842 (2d Cir. 1984), decided shortly after *Domangue*, the Second Circuit

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Agreement, although not a treaty, requires compliance from all signatories when their flight itinerary includes a stop in the United States. *Id.* Although the Agreement does not address cargo liability, we consider the Agreement and its drafting history relevant to assessing the Warsaw Convention parties' general understandings.

disagreed with the Fifth Circuit's reasoning and declined to award prejudgment interest under the Convention and the Montreal Agreement on a wrongful death claim, stressing that the Convention's purpose was to fix definite and uniform limits on the cost to airlines of damages sustained by their customers. Moreover, the court was "not convinced that the payment of prejudgment interest would necessarily have any impact on the speed with which claims under the Convention are resolved," nor was it "satisfied that [speedy resolution of claims was] one of the main purposes of the [Warsaw and Montreal] agreements." *Id.* at 852. (*But see* discussion at note 10, *infra.*) Rather, it was "beyond dispute that the purpose of the liability limitations prescribed by Article 22 was to fix at a definite level the *cost to airlines* of damages sustained by their passengers and of insurance to cover such damages." *Id.* (quoting *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir. 1977)). The court also found it significant that the Montreal Agreement provided for a liability cap of $ 75,000 for passenger injuries that was inclusive of all attorney's fees and costs, but a lower $ 58,000 cap exclusive of such fees in jurisdictions allowing separate awards. "It would appear that, if the signatories to the Agreement had intended to create any exclusions to the damage limitation figures, they would have included a specific provision in the agreement similar to the one concerning a separate award of legal fees and costs." *O'Rourke*, 730 F.2d at 853. Like the Fifth Circuit, the Second Circuit has extended its holding to the award of prejudgment interest in a cargo case. *See Exim Industries, Inc. v. Pan American World Airways*, Inc., 754 F.2d 106, 109 (2d Cir. 1985).

The Seventh Circuit has agreed with the Second Circuit's position. *Deere*, 855 F.2d at 391-92. There, too,

the court emphasized that "the preeminent purpose of the Convention was to fix definite and uniform limits on the cost to airlines of damages sustained by their customers," adding that "this goal is inherently incompatible with full compensation to all customers." *Id.* It thus held that "as part of a damage award, prejudgment interest is subject to the conditions and limits imposed under . . . the Convention. The signatories fixed a cap on liability; they did not set forth any specific provisions exempting prejudgment interest from this global damage limitation figure." *Id.* at 392.

The English Court of Appeal has also held that prejudgment interest is not permitted under the Convention. In *Swiss Bank Corporation v. Brink's-MAT Ltd.*, [1986] 2 Lloyd's Rep. 79, 101 (Eng. C. A.), that court looked to the 1955 Hague Protocol, which, as noted above, amended the Warsaw Convention. Observing that Article 22 of the Hague Protocol had made explicit that attorney's fees and costs *may* be awarded in excess of the liability caps, the court reasoned that the absence of similar language permitting prejudgment interest indicated that the award of such interest was not permissible. *Id.* Justice Bingham, however, candidly acknowledged that his interpretation "certainly is not, in my judgment, one that leaps out of the page or presents itself as so obviously correct as to enable one with supreme confidence to reject any alternative construction," and that there was no "international consensus on the construction of the Convention on this point." *Id.* at 101, 102.

B.

Having framed the analysis by examining the reasoning of our American and British colleagues, our own

analysis leads us to agree with the interpretations of the Fifth Circuit and the New York state courts. Because neither the text nor the drafting history of the Warsaw Convention itself addresses prejudgment interest, we must look to other indicators of the Convention's meaning, including its purpose and the postratification understanding of the contracting parties. *See Chan*, 490 U.S. at 134; *Tseng*, 525 U.S. at 167-76. Here, we conclude that an award of prejudgment interest is consistent with the language and purposes of the Warsaw Convention, and with postratification developments.

C. *Purpose*

1.

The Convention was intended to balance the interests of shippers seeking recovery for lost, delayed or damaged goods, and the interests of air carriers seeking to limit potential liability. *See Tseng*, 525 U.S. at 170. The award of prejudgment interest simply assures that the limited damages available to the successful claimant will not be eroded by the defendant's actions in delaying a prompt resolution of the claim. Such interest does not convert a damage award into "full compensation" to the plaintiff as the Seventh Circuit suggested, *Deere*, 855 F.2d at 392, because the carrier's damage liability remains fixed and limited by the Convention's weight-based formula. Rather, prejudgment interest is a mechanism by which the court, in an appropriate case, may assure that the plaintiff receives the full value of his limited damages. As the district court concluded here:

> Prejudgment interest should be available in this context, because without this interest plaintiff

> would not actually receive the limited compensation that is allowed under Article 22(2). If plaintiffs had recovered the value of their loss at the time of, or shortly after their cargo was damaged, then they presumably would have been able to gain a return on their money. Because the limitation on liability still provides a cap on potential damages regardless of the true value of the cargo lost or destroyed, carriers continue to have a predictable gauge of liability.

See also Eli Lilly, 508 N.Y.S. 2d at 867 ("Were prejudgment interest disallowed, the money paid would, in essence, be less than the limitation imposed by the Convention. It would be the present value of a future payment, a discounted amount."). As the court stated in *Eli Lilly*, "the purpose of the Convention -- to fix at a definite level *the cost to airlines* of damages [--] is served rather than thwarted by awarding interest." *Id.* (internal quotations and citation omitted).[9]

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[9] Prejudgment interest is widely recognized by federal courts as a means to restore to a plaintiff the actual value of damages where there has been a delay between the time of injury and the date of judgment. *See, e.g., Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655, 76 L. Ed. 2d 211, 103 S. Ct. 2058 (1983); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 922 (9th Cir. 1995)("Money has a time value, and prejudgment interest is therefore necessary in the ordinary case to compensate a plaintiff fully for a loss suffered at time t and not compensated until t +1.")(internal quotation marks and citation omitted).

Moreover, such a potential interest award does not defeat the Convention's important objective of having damages that are "fixed, uniform and knowable." *Deere*, 855 F.2d at 392. The amount of such potential interest -- both the maximum and the most probable -- can be reasonably calculated given that Article 22 fixes a maximum amount of damages and the interest rate is a known factor. For example, in the present case, involving a shipment of goods, K&N could have calculated its maximum exposure (with or without prejudgment interest) based on the weight of the entire shipment at the time it issued its air waybill.

2.

The award of prejudgment interest also is consistent with an additional purpose of the Warsaw system, a purpose emphasized by the Montreal Agreement of 1966: to foster speedy resolution of lawsuits under the Convention.[10] As noted earlier, the Montreal Agreement, a private pact among airlines approved by the United States but not applicable to Motorola's cargo-damage claim here, does inform our interpretative analysis. *See* note 8, *supra*. During the negotiations over the Montreal Agreement, delegates

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[10] We disagree with the Second Circuit's conclusion that "the speedy resolution of claims was apparently not an important United States objective at the [1966 Montreal] conference" -- a linchpin of its own rejection of the Fifth Circuit's contrary conclusion in *Domangue*. *See O'Rourke*, 730 F.2d at 853 n.20. The very authority *O'Rourke* cites repeatedly states otherwise. *See* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 570-72, 587, 600 (1967).

expressed concern that liability awards be paid quickly and economically, maximizing the amount of compensation a passenger would realize from the limited damages available. The airlines would enjoy a capped amount of damages, providing them with a fixed and readily insurable potential exposure, in exchange agreeing to "absolute" liability such that passengers might avoid protracted investigations and litigation that would delay payment and eat into the amount of money they actually recovered.[11] As two authoritative sources, themselves American delegates at the 1966 Montreal Conference, have emphasized, speedy resolution of claims was a central concern of the delegates. *See* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 587 (1967) ("With absolute liability, litigation would be reduced, settlements would be quicker, and the value of plaintiffs' recoveries would, it was argued, be substantially greater than under the Warsaw system."); *id.* at 600 ("But in the present context of acceptance of a limit on liability at a level lower than the desired goal, absolute liability was viewed primarily in terms of the prospect of quicker and less expensive settlements, with less time and less money going for litigation than would have prevailed under the common law system . . . . Experience had shown that in major personal injury and death cases litigation and delay seriously impair the value of

---

[11] "Under the Warsaw Convention as modified by the Montreal Agreement, liability can accordingly be viewed as 'absolute' only in the sense that an airline cannot defend a claim on the ground that it took all necessary measures to avoid the injury." *Air France v. Saks*, 470 U.S. 392, 407, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985). A carrier can still defeat liability on grounds other than its exercise of due care.

the compensation eventually awarded."); *see also id.* at 570-72, 590. By discouraging unwarranted delays, prejudgment interest furthers the purpose of speedy resolution of claims.

D. *Postratification Developments*

1.

Postratification developments also imply that the Convention permits prejudgment interest in excess of the liability caps. Specifically, there is evidence that the contracting parties have understood the Convention's limitations on damages not to be inviolate, but to be subject to, for example, costshifting exceptions. The 1955 Hague Protocol discussed in Part I, above, amended the Convention to provide explicitly for the award of costs and attorney's fees, in accordance with local law and custom, above and beyond the Convention's liability limits:

> *The limits prescribed in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff.* The foregoing provisions shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage or before the commencement of the action, if that is later.

Article 22(4) (emphasis added).[12] By all indications, this was a *clarifying* amendment, not one that worked a substantive change. Indeed, as has been observed, at the time of the Hague conference in 1955, "no one outside the United States had previously thought that the Warsaw Convention prevented a charge on the defendant for the plaintiff's costs," including attorney's fees. Lowenfeld & Mendelsohn, *supra*, *80 Harv. L. Rev. at 508. See Domangue*, 722 F.2d at 261.

The actions at The Hague and the account of Lowenfeld and Mendelsohn thus indicate that the Warsaw signatories did not envision the Convention's liability caps as

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[12] Article 22(4) was amended by the as-yet-unratified 1999 Montreal Convention to permit explicitly the award of "interest" as well as costs and fees:

> The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, *including interest* . . . .
>
> Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 May 1999, S. Treaty Doc. No. 106-45, Art. 22(6)(emphasis added). This uncontroversial amendment by its terms does not appear to deal with the issue of prejudgment interest. *See also* 2 International Civil Aviation Organization, *International Conference on Air Law, Montreal 10-28 May 1999*, at 31, 41 (2001)(Documents); 3 *id.* at 149, 176(Preparatory Materials).

ceilings on the amount of money a carrier would have to pay. The reasoning of both the Seventh Circuit and the Second Circuit that "air carriers should be protected from having to pay out more than a fixed sum for passenger injuries sustained in international air disasters," *O'Rourke*, 730 F.2d at 852 (quoting *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir. 1977)); *see Deere*, 855 F.2d at 391, and that only explicit exceptions are permitted, *id.* at 392, appears to be based on a mistaken premise. Although the liability caps obviously restrict damages, they are not an absolute ceiling on a carrier's total payout. And the history of the Hague Protocol indicates that the Warsaw signatories did not understand the absence of the Convention's explicit authorization for costs and attorney's fees to have precluded a court from shifting those costs to the carrier. Thus, finding an implicit authority to award prejudgment interest to assure that the plaintiff receives the full value of the capped damages -- shifting to the defendant the burden of the time value of money -- likewise could not offend the Convention.[13]

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[13] We recognize that costs and attorney's fees are not "damages," whereas prejudgment interest is so characterized. *See Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335, 100 L. Ed. 2d 349, 108 S. Ct. 1837 (1988) (characterizing prejudgment interest as a component of damages). But we think this parses things too finely. Conceptually, prejudgment interest more closely resembles other costs of litigation -- attorney's fees and costs -- than damages. Moreover, the overriding purpose of the 1929 Convention was to aid the growth of the "then-fledgling international airline industry." *Tseng*, 525 U.S. at 170. It could not have mattered whether the cap was exceeded because of additional "damages" in form of prejudgment interest or because of "costs" and "fees."

As discussed in Section II. A, above, those courts that have ruled against prejudgment interest have been persuaded that the post-Warsaw Convention treatment of attorney's fees and costs through explicit provisions weighs against finding implicit authority for an additional award of interest. There is some force to that reasoning. Nonetheless, given the history we have reviewed above, we are reluctant to consider the treatment of fees and costs dispositive on the issue of prejudgment interest. That the contracting parties have elected to deal with one set of particular costs to carriers does not signal a conscious understanding that prejudgment interest is barred absent an amendment to the Warsaw Convention. Indeed, given that the long-standing, conflicting court rulings on prejudgment interest have not motivated the contracting parties to adopt one position or the other, we cannot accept that the failure to address prejudgment interest in the postratification era means it was foreclosed by the 1929 Warsaw Convention.

E.

Having thus reviewed the various sources that might assist our interpretation of the Convention, we are persuaded that the district court adopted the better view. Nothing in the text or history of the Warsaw Convention generally or Article 22 in particular shows the Convention's drafters intended to exclude an award of prejudgment interest. Such interest is consistent with the purposes of the Convention and comports with the available evidence of the postratification understanding of the contracting parties. We therefore hold

that, in an appropriate case, a court may exercise its discretion to award prejudgment interest.[14]

CONCLUSION

We affirm the district court's award of $ 244,080 and prejudgment interest to Motorola.

AFFIRMED.

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[14] K&N asserts only that the district court had no authority to award interest. K&N does not argue that the district court abused its discretion by doing so. *See Simeonoff v. Hiner*, 249 F.3d 883, 894 (9th Cir. 2001)("We review a grant or denial of prejudgment interest for abuse of discretion."). Accordingly, we do not consider that question.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99 03659 WHA

[Filed November 3, 2000]

MOTOROLA, INC., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,
Plaintiffs,

v.

FEDERAL EXPRESS, a corporation; KUEHNE & NAGEL, INC., a corporation, and DOES ONE through TEN, inclusive,
Defendants.

JUDGES:
WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

JUDGMENT

Trial was held in this case on October 24-25, 2000. During trial plaintiffs abandoned their claims against defendant Federal Express, and all claims against Federal

Express are, therefore, dismissed. For reasons stated on the record (October 25, 2000), judgment is entered in plaintiffs' favor as against defendant Kuehne & Nagel, for damage done to plaintiff Motorola's cargo during shipping on or about July 17, 1997. Kuehne & Nagel is liable to plaintiff for the sum of $ 244,080.00.

Though the Ninth Circuit has not yet spoken about the propriety of awarding prejudgment interest in a Warsaw Convention cargo case, this order holds that such interest is proper in this circumstance. In the non-Warsaw Convention context, prejudgment interest is awarded in maritime cases as a matter of course. *See City of Milwaukee v. Cement Division, Nat. Gypsum Co.*, 515 U.S. 189, 195, 132 L. Ed. 2d 148, 115 S. Ct. 2091 (1995); *see also Columbia Brick Works Inc. v. Royal Insur. Co. of* America, 768 F.2d 1066, 1071 (9th Cir. 1985). There is a split among circuits with regard to the award of prejudgment interest in Warsaw Convention cases. The Fifth Circuit views prejudgment interest as consistent with the goals of the Warsaw Convention and the later Montreal Agreement, and the Second and Seventh Circuits (most notably in the Seventh Circuit's decision in *Deere v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385, 391-392 (1988); *see also Exim Indust. v. Pan American*, 754 F.2d 106, 109 (2nd Cir. 1985) and *O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842, 853 (2nd Cir. 1984)), oppose this interest on the basis that the convention intended to limit carriers' liability.

The Warsaw Convention's liability scheme engenders the goals of adequately compensating those who suffer losses during air transportation, providing predictability with regard to carriers' exposure to liability and encouraging settlement.

These goals are not inconsistent with an award of prejudgment interest. Prejudgment interest is not assessed to penalize defendants but to fully compensate the party suffering loss by acknowledging the time value of its money (which defendant enjoyed during the delay of payment). *See Rosa v. Insur. Co. of the State of Penn.*, 421 F.2d 390, 393 (9th Cir. 1970). Prejudgment interest should be available in this context, because without this interest plaintiff would not actually receive the limited compensation that is allowed under Article 22(2). If plaintiffs had recovered the value of their loss at the time of, or shortly after their cargo was damaged, then they presumably would have been able to gain a return on their money. Because the limitation on liability still provides a cap on potential damages regardless of the true value of the cargo lost or destroyed, carriers continue to have a predictable gauge of liability. Furthermore, other goals of the convention are advanced by the award of prejudgment interest. Such an award, for example, does not dissuade settlement, and may in fact encourage the efficient resolution of claims. *See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways*, Inc. 737 F.2d 456, 460 (5th Cir. 1984) (upholding the award of prejudgment interest in a Warsaw cargo case, citing *Domangue v. Eastern Air Lines, Inc*, 722 F.2d 256, 262-264 (5th Cir. 1984) a Warsaw wrongful-death case, for support); *see also Maro Leather Co. v. Trans World Airlines, Inc.*, 161 Misc. 2d 920, 922-23, 617 N.Y.S.2d 617 (N.Y. 1994) *cert. denied* 514 U.S. 1108 (1995). For these reasons, Motorola shall receive prejudgment interest running from the date of the cargo loss to the date of the entry of this judgment. The rate of prejudgment interest is set by the 52-week U.S. Treasury Bill rate prevailing on the day of the cargo loss, and is compounded annually. *See Western Pacific Fisheries Inc. v.*

SS PRESIDENT GRANT, 730 F.2d 1280, 1288-89 (9th Cir. 1985); 28 U.S.C. 1961(b). Lastly, each party shall bear its own costs.

IT IS SO ORDERED.

Dated: November 2, 2000

/s/ _____
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 18 2003
OFFICE OF THE CLERK

No. 02-1066

IN THE

Supreme Court of the United States

KUEHNE & NAGLE, INC.,

Petitioner,

v.

MOTOROLA, INC. and
FIREMAN'S FUND INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is awarding prejudgment interest appropriate in a case governed by Article 22 of the Warsaw Convention?

(2) Should this Court review an affirmance of a factual finding that damage to a portion of the shipment rendered the entire shipment inoperable so as to require the total weight of the shipment to be used in calculating the carrier's limit of liability under Article 22(2) of the Warsaw Convention?

RULE 29.6 STATEMENT

Respondent, Fireman's Fund Insurance Company, is wholly owned by Allianz Aktiensgesellschaft Holding (known as Allianz AG), a publicly traded German corporation. Respondent, Motorola, Inc., a publicly traded United States corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, September 28, 1955, 478 U.N.T.S. 372 (the "Hague Protocol"), *reprinted in* Sorkin, Goods in Transit, Volume VII 3

Warsaw Convention (for the Unification of Certain Rules Relating to International Transportation by Air) October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* note following 48 U.S.C. § 40105 (1995) 3

INTRODUCTION

Neither of the issues presented warrants review by this Court. Regarding the prejudgment interest issue, not every split in the circuit court decisions requires review. In the case of prejudgment interest, the Warsaw Convention's severe limitations on the principle amount of any recovery make the amount of prejudgment interest awarded relatively small. Because the dollar amounts involved are not significant, this issue does not possess such overwhelming importance to warrant use of this Court's limited resources for review.

With respect to the affected weight issue, none of the usual reasons for review are present. Rather, a factual finding by the district court lies at the heart of the issue: When does damage to one part of a shipment affect the value of the entire shipment? There is no conflict in the circuits on application of the legal principle involved. Further, the Senate ratified Montreal Protocol No. 4 (MP4) after the date of this transaction, mandating application of the 1955 Hague Protocol affected weight standard to Warsaw cargo shipments henceforth in any event. Petitioner thus fails to raise any legal issues that support review of the affirmance of the district court's factual finding that the damage, which rendered the entire system inoperable, affected the value of the shipment.

REASONS FOR DENYING THE WRIT

A. The Prejudgment Interest Issue Is Not Substantial and Was Correctly Decided.

1. The Question of Awarding Prejudgment Interest in a Warsaw Limitation Case Does Not Possess Sufficient Importance to Warrant Review.

The overwhelming majority of Warsaw cases settle and never reach the trial stage. Of those few that do go to trial, even fewer reach the appellate courts. While the few appellate courts that have considered the issue have come to differing conclusions, as set forth in petitioner's writ, that does not automatically require review by this Court. Quite simply, in terms of dollar amounts, the issue of awarding prejudgment interest in a Warsaw limitation case is not of overwhelming importance to warrant review.

In Warsaw cases involving damage to cargo, the Convention's limitation provision provides for low damage awards. *See Transworld Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (carrier's liability for $250,000 shipment limited to $6,475); *Republic National Bank v. Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987) (carrier's liability for $2 million dollar shipment limited to $634); *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways*, 737 F.2d 456 (5th Cir. 1984) (carrier's liability limited to $16,870) *Federal Ins. Co. v. Air Express Int'l Corp.*, 1994 WL 176967 (S.D.N.Y. 1994) (carrier liability limited to $352); *Tokio Marine v. United Airlines Inc.*, 933 F. Supp. 1527 (C.D. Cal. 1996) (carrier's liability limited to $7,700). Even in those few cases where the damage affects the value of the entire shipment, as in this case, the Convention severely limits

recoveries. *See Deere & Co. v. Lufthansa*, 855 F.2d 385 (7th Cir. 1988) (involving a principal award of $115,957 in which the district court awarded prejudgment interest in the amount of $45,000). Because of such low damage awards, prejudgment interest awards are thus correspondingly small. In this case, the prejudgment interest amounted to only about $41,000.

Similarly, in cases involving wrongful death, the dollar amounts involved are not significant. In cases subject to the unamended Warsaw Convention, damages are limited to a maximum of $75,000. *See O'Rourke v. Eastern Airlines*, 730 F.2d 842 (2d Cir. 1984); Article 22 of the Warsaw Convention (for the Unification of Certain Rules Relating to International Transportation by Air) Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* note following 48 U.S.C. § 40105 (1995). In cases subject to The Hague Protocol 1955, which went into force in the United States pursuant to the United States' ratification of MP4 and which increases recoverable damages, the maximum limit merely doubles. *See* Article 22(a) of the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, September 28, 1955, 478 U.N.T.S. 371 (the "Hague Protocol"), *reprinted in* Sorkin, Goods in Transit, Volume VII. In either instance, any award of prejudgment interest would still be quite small.

Given the fact that very few Warsaw cases complete the trial phase and the fact that the monetary amounts involved are relatively small, the question of awarding prejudgment interest in Warsaw limitation cases does not possess sufficient importance for this Court to devote its limited and valuable resources to reviewing. Compelling reasons for review therefore do not exist.

2. Failing to Awarding Prejudgment Interest in a Warsaw Case Allows an Air Carrier to Pay Less than the Limit Mandated by Warsaw.

Petitioner incorrectly frames the issue in terms of an award *in excess* of Warsaw limits. In fact, failing to award prejudgment interest results in an award of *less* than Warsaw limits. An air carrier knows the weight of the shipment from the moment the carrier issues its air way bill and charges freight. At that point, its maximum exposure is ascertainable to the penny. As recognized by the trial court and the Ninth Circuit in this case, failing to award interest on that sum *reduces* the air carrier's liability below Warsaw limits. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), pages 15a-27a of Appendix A to Petitioner's Petition.

This principle was succinctly explained by the court in *Eli Lilly Argentina v. Aereolinas Argentinas*:

> [T]he purpose of the Convention — 'to fix at a definite level the cost to airlines of damages' (cit.om.). is served rather than thwarted by awarding interest. The airline's liability is known upon the date of the loss; interest is earned by the airline on that amount until the date of judgment. *Were prejudgment interest disallowed, the money paid would, in essence, be less than the limitation imposed by the Convention. It would be the present value of a future payment, a discounted amount.* And the limitation would not be uniformly fixed worldwide because it would vary according to the degree of congestion in each forum's courts, procedural delays, and the tactics of the parties.

508 N.Y.S.2d 865, 867 (Civ. Ct. New York, 1986) (*emphasis added*).

The principle is easily illustrated: Upon the occurrence of a loss, the air carrier could either pay the loss as limited by Warsaw or deposit the same sum into an interest-bearing account. If the sum is deposited into the account, at the conclusion of the litigation, if the plaintiff is successful, the plaintiff is entitled to the amount in the account. Without interest, the limitation amount is less than the limit required by Warsaw.

B. There Is No Basis for Reviewing the Ninth Circuit's Affirmance of the Trial Court's Calculation of Damages.

1. The Calculation of Damages Was a Factual Finding.

The Ninth Circuit correctly noted that the parties had agreed in the joint final pretrial order that the Warsaw limitation applicable to the shipment would be calculated according to the weight of the entire shipment — and not just that of the damaged portion — if Motorola proved at trial that the damage to the shipment rendered the entire system inoperable and caused the construction of operation of the system to be delayed for a period of several weeks. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), page 4a of Appendix A to Petitioner's Petition. After a trial at which petitioner *no evidence* to rebut Motorola's evidence, the trial court found that the entire cellular base system could not function at all without the damaged control frame because it was the "heart and soul" of the overall system. The trial court determined that a legitimate and reasonable inference could be drawn that the actual assembly of the entire system was delayed by the length of time it took to replace the control frame — six weeks. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), page 12a-13a of Appendix A to Petitioner's Petition.

Having agreed to the method of calculating damages at trial, Petitioner nonetheless made the same baseless "no evidence" argument in the Ninth Circuit that it raises here. The Ninth Circuit rejected it:

> The district court did not clearly err in relying on Koepke's expert testimony and finding that the damage to the control frame affected the value and operation of the entire base station. Accordingly, the court properly determined that the liability limitation here must be based on the weight of the entire cellular base station, not only on that of the damaged control frame.

Motorola Inc. v. Federal Express Corp., 308 F.3d 995 (9th Cir. 2002), page 13a of Appendix A to Petitioner's Petition.

The claim that no evidence was introduced was a misstatement to the Ninth Circuit and is a misstatement here. It provides no basis for granting the petition.

2. Petitioner Has Failed to Raise any Legal Issue Supporting Review of the Calculation of Damages.

Petitioner has not pointed to any conflict in the circuits regarding the affected weight standard applied by the trial court and the Ninth Circuit in calculating Motorola's damages based on the weight of the entire cellular base station. Indeed, the Ninth Circuit noted that federal courts considering the issue in Warsaw cases have uniformly applied the affected weight standard. *See Motorola Inc. v. Federal Express Corp.*, 308 F.3d 995 (9th Cir. 2002), page 9a-12a of Appendix A to Petitioner's Petition. Thus, there is no conflict in the circuits as a basis for review.

Further, as recognized by Petitioner, with the ratification of MP4 in 1999 (well after the shipment at issue) which codifies the Hague Protocol of 1955 affected weight standard, *see* Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on Sept. 8, 1955, r*eprinted in* S. Exec. R. No. 105-120 (1998), there is no longer any doubt that the standard must be applied to the calculation of damages in all Warsaw cases where the entire shipment is affected by loss or damage to a portion of it. There is no showing that the lower courts have difficulty applying the standard. Indeed, it appears from the reported cases that the application has been uniform.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 02-1066

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IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, Sept. 28, 1955, 478 U.N.T.S. 371 (1955 Hague Protocol") 2n, 5, 7

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, as amended by the Protocol Done at The Hague, 1955 and by Protocol No. 4 of Montreal, 1975, *reprinted in* S. Exec. Rep., No. 105-20 (1998) ("Montreal Protocol No. 4") 3-4

Other Authorities:

I *International Conference on Private Air law, The Hague, September 1955–Minutes*, ICAO Doc. 7686-LC/140 (Sept. 1956)..... 6

ICAO Legal Committee, *Minutes of the Ninth Session, Rio de Janeiro, 25 August–12 September 1953*, ICAO Doc. 7450-LC/136-1 (1954) 6

Petitioner KUEHNE & NAGEL, INC. ("KNI") respectfully submits this reply to Respondents' Brief in Opposition ("Opp. Brief") to the Petition for writ of certiorari.

ARGUMENT

I

THE UNDISPUTED CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE AWARD OF PREJUDGMENT INTEREST BEYOND THE TREATY'S LIABILITY LIMIT REQUIRES THE COURT'S INTERVENTION

Respondents concede, as they must, that there is a conflict among the Circuit Courts as to whether prejudgment interest may be awarded in addition to the Article 22 limit of liability of the unamended Warsaw Convention.[1] *See* Opp. Brief at 2; *see also* Petition at 8-15 citing cases. In fact, even the Court of Appeals below recognized the conflict. *See* Appendix to Petition for Writ of Certiorari ("Petition App.") at 15a-18a. Nevertheless, respondents claim that the issue of prejudgment interest is not sufficiently important to warrant review by this Court because (1) "any award of prejudgment interest would still be quite small," and (2) "very few Warsaw cases complete the trial phase." *See* Opp. Brief at 3. Respondents' unsupported arguments are incorrect and, even if accepted as true, they cannot justify the con-

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C.A. § 40105 (1997) (note). It is undisputed that this action is governed by the unamended Warsaw Convention.

tinued misinterpretation and misapplication of a treaty of the United States.

The issue of prejudgment interest arises in every Warsaw Convention case, regardless of its value or whether the case settles,[2] proceeds to trial or is appealed. To allow the acknowledged conflict to continue on such a basic issue involving one of the most widely and often applied treaties in the world is intolerable. Indeed, allowing this conflict to continue will lead to forum shopping, which consistently has been discouraged since the Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 54 (1938). *See Hanna v. Plummer*, 360 U.S. 460, 468 (1965).

The language of Article 22(2) of the Warsaw Convention is clear and unambiguous: "In the transportation of checked baggage and goods, the liability of the carrier shall be limited to the sum of 250 francs per kilogram. . . ." The decision of the Court of Appeals below, as well as the decisions of the Fifth Circuit,[3] in effect improperly amend Article 22(2) to read: "In the transportation of checked baggage and goods, the liability of the carrier shall be limited to the sum of 250 francs per kilogram **in addition to the prejudgment interest thereon**. . . ." "Postratification adjustments, however, are appropriately made by the treaty signatories." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 171, n.12 (1999).[4] As the Court consistently has cautioned: "where

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[2] Common sense dictates that the specter of a recovery of prejudgment interest (or not) affects the settlement value of a case.

[3] *See Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262-64 (5th Cir. 1984); *Boehringer-Manheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 460 (5th Cir. 1984).

[4] Even the provisions of the 1955 Hague Protocol relied upon by the Court below (Petition App. at 23a-24a) do not expressly allow prejudgment interest. *See* Protocol to Amend the Convention for the

the text is clear, as it is here, [a court] has no power to insert an amendment." *Chan*, 490 U.S. at 134.

The conflict is undisputed and intolerable. The Court should reject respondents' proffered rationale for ignoring the conflict and grant the Petition for Writ of Certiorari to bring the lower courts back in line with the express text of Article 22(2) of the Warsaw Convention.

II

THE COURT SHOULD CORRECT THE IMPROPER APPLICATION OF THE "AFFECTED VALUE" DOCTRINE

The issue before the Court is whether the "affected value" doctrine was applied properly in this case, based on the facts as determined by the district court and as governed by the unamended Warsaw Convention. Although there is no conflict among the Circuit Courts on this issue (in fact, there are no controlling Circuit Court decisions), the issue is of extreme importance, as the lower courts have misinterpreted one of the central provisions of the Warsaw Convention—Article 22. If allowed to stand, this misinterpretation will be perpetuated by other courts in cases involving both the unamended Warsaw Convention and the Convention as amended by Montreal Protocol No. 4.[5] Accordingly, this

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Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, Sept. 28, 1955, 478 U.N.T.S. 371. In any event, while the drafting history and post-ratification conduct of the parties may be relevant if the text is ambiguous or to confirm its meaning, they cannot serve as a basis to amend the express text. *See Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 225 (1996); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

[5] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, as amended by

issue of treaty interpretation is important, has wide-ranging effect and is recurring. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint, Corp.*, 466 U.S. 243 (1983) (addressing proper interpretation of Article 22).

The "affected value" doctrine is not part and parcel of Article 22 "in all Warsaw cases" as argued by respondents. *See* Opp. Brief at 6-7. Moreover, petitioner did not "agree[ ] to the method of calculating damages at trial." Opp. Brief at 5-6. Rather, for purposes of trial, petitioner agreed only that the method of calculation had been resolved by summary judgment as follows:

> [if] the damage to the shipment rendered the entire system inoperable and caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the proper weight to be considered under Article 22(2) of the Warsaw Convention is the total weight of the shipment.

See Summary Judgment Order (Reply App. at 10a).[6] This portion of the district court's summary judgment order was then incorporated into the Joint Final Pretrial Order under the heading entitled "Legal Issues Resolved By Summary Adjudication Order." *See* Joint Final Pretrial Order (Reply App. at 24a).

A. The 1955 Hague Protocol's "Affected Value" Doctrine Cannot Properly Be Read Into the Unamended Warsaw Convention

The first and foremost goal of the Warsaw Convention was to limit the liability of the air carrier for lost cargo. *Franklin Mint. Corp.*, 466 U.S. at 256. "The Conven-

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the Protocol Done at The Hague, 1955 and by Protocol No. 4 of Montreal, 1975, *reprinted in* S. Exec. Rep., No. 105-20 (1998).

[6] All references preceded by "Reply App." refer to pages in the Appendix hereto.

tion's second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry." *Id.* Thus, the "affected value" doctrine, absent from the express language of Article 22(2) of the Warsaw Convention, should be rejected as contrary to both of these goals.

Article 22(2) of the unamended Warsaw Convention does not contain any language upon which the "affected value" doctrine can be based. The text is clear and direct:

> In the transportation of checked baggage and of goods, **the liability of the carrier shall be limited to a sum of 250 francs per kilogram**, unless the consignor has made, at the time when the **package** was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than, the actual value to the consignor at delivery.

Warsaw Convention, Article 22(2) (emphasis added).

The language used in Article 22(2) evinces that the liability limit is calculated based upon the weight of the damaged "package" and not on the weight of the entire "shipment" or other "packages." Moreover, application of the "affected value" doctrine necessarily leads to unpredictability and increased liability for items not actually damaged.

Nevertheless, the Court below found that "the text and drafting history of the Warsaw Convention are silent on this question" and turned to the text of the 1955 Hague Protocol as putative support for the application of the "affected value" doctrine to this unamended Warsaw

Convention case. *See* Petition App. at 8a-10a. Article XI of the 1955 Hague Protocol amends Article 22(2) of the Warsaw Convention as follows:

> In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of any object contained therein, **affects the value of other packages** covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

1955 Hague Protocol, Article XI (emphasis added).

The characterization by the Court below of the 1955 Hague Protocol amendment as a mere *clarification* (Petition App. at 9a) is based upon an improper reading of the 1955 Hague Protocol drafting history. *See, e.g.*, I *International Conference on Private Air law, The Hague, September 1955–Minutes*, at 251-253, ICAO Doc. 7686-LC/140 (Sept. 1956); ICAO Legal Committee, *Minutes of the Ninth Session, Rio de Janeiro, 25 August–12 September 1953*, ICAO Doc. 7450-LC/136-1 at 153-55 (1954) (comments of Mr. Drion (Netherlands) and Mr. Ambrosi (Italy)). Neither does the decision of the Court of Appeals in *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385 (7th Cir. 1988), support the decision of the courts below. Although the Seventh Circuit in *Deere* acknowledged the importance of the issue, as the parties agreed to its application, the Court declined to address the applicability of the "affected

value" doctrine to unamended Warsaw Convention transportation. *Id.* at 391, n. 13.

As with the prejudgment interest ruling, the Court below improperly read language into Article 22(2) of the Warsaw Convention to allow for recovery of damages not allowed by the plain text of the Convention. *See Tseng*, 525 U.S. at 171, n.12; *Chan*, 490 U.S. at 134.

B. Even the "Affected Value" Doctrine Requires Evidence that the Value of the Undamaged Cargo Was "Affected"

Assuming that the "affected value" doctrine was applicable to the unamended Warsaw Convention, the Court below misapplied the doctrine in this case. The proper evidentiary standard of the "affected value" doctrine is legal, not factual as argued by respondents. *See* Opp. Brief at 5-6.

The express language of the 1955 Hague Protocol requires that a cargo's loss, damage or delay "affect[ ] the value of other packages" to increase the carrier's limit of liability to more than just the weight of the packages actually damaged, which inherently requires evidence of the diminution in the "value" of the other undamaged packages. Here, the courts below did not look at whether the damage to the control frame actually "affected the value of other packages" of the cellular base station. Rather, the district court focused only on whether the construction and operation of the base station was delayed, and this error was compounded by respondents' failure to submit evidence that this delay actually had any effect on the "value" of the undamaged components. *See* Petition App. at 12a-15a; Reply App. at 10a.

As justification for the "affected value" doctrine, both of the courts below relied on the decisions of the courts

in *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 621 F. Supp. 712 (N.D. Ill. 1985), *aff'd*, 855 F.2d 385 (7th Cir. 1988). In *Deere*, plaintiff sued for damage to a "director frame," one of a number of components comprising part of an IBM Model 3032 computer. 621 F. Supp. at 721-22. Although the damage was to only one component of the computer, it rendered the computer inoperable and could not be replaced for a period of several months. *Id.* at 722. Based on this, the *Deere* district court calculated the Warsaw Convention limit of liability based on the weight of the entire shipment, instead of just the damaged component. *Id.* Significantly, in *Deere*, plaintiff claimed $195,500 in damages, consisting of the cost of repair and associated transportation costs, and the cost of leasing a replacement computer for the several months in which the computer was inoperable. *Id.* On appeal, the Seventh Circuit upheld the district court's decision but did not actually review whether the "affected value" doctrine was applicable as a matter of treaty law. *Deere*, 855 F.2d at 391.

Here, respondents' damages related solely to the 680 kilogram portion of the shipment actually damaged, but they seek to calculate the liability limit based upon the weight of the entire shipment (*i.e.*, 12,204 kilograms). The "affected value" doctrine, however, required respondents to present some evidence of how the damaged component affected the "value" of the other components (*i.e.*, diminution of value). None was presented and a delay in obtaining a replacement part, standing alone, is insufficient to establish that the damage to one package affected the value of the other packages. Even in *Deere*, there was evidence that the damaged shipment and delay, in fact, affected the value of the undamaged components.

The Court below misapplied the "affected value" doctrine to Article 22 of the unamended Warsaw Convention

to increase the limit of liability based upon the weight of the entire shipment rather than the packages actually damaged (and further disregarded the true Article 22 treaty limit of liability by the imposition of prejudgment interest on this inflated value), contrary to clear treaty law and the goals of the Convention's drafters.

CONCLUSION

The Petition for Writ of Certiorari should be granted in all respects.

Dated: April 29, 2003

Respectfully submitted,

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REPLY APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-03659 WHA
Filed September 25, 2000

MOTOROLA, INC., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Plaintiffs,

—v.—

FEDERAL EXPRESS, a corporation; KUEHNE & NAGEL, INC., a corporation, and DOES ONE through TEN, inclusive,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT TO MOTOROLA, DENYING SUMMARY JUDGMENT TO FEDERAL EXPRESS AND GRANTING SUMMARY JUDGMENT TO KUEHNE & NAGEL

INTRODUCTION

In this action for breach of contract and negligence, the general issue concerns allocation of the risk of loss for damage done to Motorola's shipment from Dallas to Tokyo. The parties filed cross motions for summary judgment. In each motion herein decided, the summary judgment record was viewed in the light most favorable to the nonmoving party.

The Warsaw Convention applies to this shipment. The convention's provisions on limits on liability apply. The limit of liability, the Court holds, is assessed based upon the weight of the overall cargo if it is shown at trial that the overall Cellular Base Station system was affected by the damage to part of the shipment. This and other issues will be addressed below.

STATEMENT

Motorola hired Kuehne & Nagel to transport a Cellular Base Station system. On July 10, 1997, Relocation Services Inc. (RSI), a company hired by Motorola, packaged the cargo into a number crates. Kuehne & Nagel then arranged for Federal Express to ship the cargo. Between July 10 and July 15, Federal Express used several planes to transport this equipment. Both Kuehne & Nagel and Federal Express issued "clean" air waybills. A clean air waybill means that there was no apparent damage to the cargo before transport. Kuehne & Nagel and Motorola claim that Kuehne & Nagel noted damage to a portion of the cargo when the shipments arrived in the airport in Tokyo. Upon receiving them, Motorola claims that part of the Cellular Base Station system had sustained severe damage. Motorola replaced the equipment allegedly damaged, and was reimbursed for this

expense, less its $25,000.00 deductible, by its insurance company, Fireman's Fund. On June 21, 1999, Motorola and Fireman's Fund filed this action against Kuehne & Nagel and Federal Express based upon breach of contract and negligence. This order responds to various cross-motions for summary judgment.

ANALYSIS

The Summary Judgment Standard

In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"[A] party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *SA Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidds & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Rule 56 provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts [that would be admissible as evidence] showing that there is a genuine issue for trial . . . ."

The Court does not make credibility determinations with respect to the evidence offered and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv., Inc.* v *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987) (*citing Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Summary judgment is not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts . . . ." *Hollingsworth Solderless Terminal Co.* v *Turley*, 622 F.2d 1324 (9th Cir. 1989).

The Warsaw Convention

The Warsaw Convention governs situations that arise from the "international transportation of persons, baggage or goods performed by an aircraft for hire." Warsaw Convention (for the Unification of Certain Rules Relating to International Transportation by Air) October 12, 1929, at 1(1), 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 40105 note (1995). The convention applies where, as here, the place of departure and the place of destination are located within the territories of two High Contracting Parties. Warsaw Convention Art.1(2). The movement of the Cellular Base Station system is considered the "transport of goods" as defined by the convention. Warsaw Convention Art. 1(2). Both Federal Express and Kuehne & Nagel are subject to carrier liability under the convention.[1]

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[1] As an "indirect air carrier" (a freight forwarder who issues air waybills), Kuehne & Nagel is bound by the provisions of the convention. *See Hitachi Data Systems Corp. v. Nippon Cargo Airlines*, 1995 WL 16923, at *5 (N.D.Cal. Jan. 6, 1995).

The Limit on Liability Is Based Upon the Total Affected Weight of The Shipment

Article 22(2) of the convention provides a limit on a carrier's liability. Article 22(2) provides:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires.

Liability is established on the basis of the weight of the cargo to $20 per kilogram (or $9.07 per pound). The convention, however, is silent as to the weight that should be considered in a case such as this, in which damage done to a single package arguably affects the value of the entire shipment.

If the Court were writing on a clean slate, some strong practical arguments could be made for limiting the carriers' liability to only those packages damaged. First, it is left up to the shipper how to subdivide the shipment and the shipper is in a position to subdivide (or not) so as to fashion the limits preferred. (RSI, acting as Motorola's agent, packaged the shipment at issue.) Second, the convention explicitly permits a "declared higher value," so that shippers would be in a position to protect themselves. Third, this provision of the Warsaw Convention is vague and/or silent as to its intent on this issue. There is no persuasive legislative history or convention deliberations that illuminate the question. The supplements filed after oral argument do not supply any convincing evidence of intent at the time the Warsaw Convention was adopted. In such circumstances, much can be said for letting the parties resolve such silence by

contract. Article 33 permits such contracting so long as it does not conflict with the convention. If the contract could be used for this purpose, then this issue would probably be controlled by *Read Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999). There, the Ninth Circuit construed language similar to the waybill at issue to limit liability to the package damaged—and not the entire shipment. That decision was based on federal common law and not on the Warsaw Convention.

But there is not a clean slate. The issue of the proper weight to consider when applying the limitation-on-liability provision was first addressed in *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 621 F. Supp. 721 (N.D.III. 1985), *aff'd*, 855 F.2d 385 (7th Cir. 1988). In *Deere*, one portion of a shipment, containing the "directors frame" of a computer, was damaged during transport to Germany. The court ruled that the weight of the entire shipment, which consisted of the various components of a single computer, was to be used in calculating the limitation of liability of the carrier under Article 22(2). *See id.*at 721. The court explained that damage done to the "directors frame" affected the value of the entire shipment, because the entire computer was rendered inoperable for several months until the damaged part could be replaced. *See id.*at 721.

The "affected-weight" rule as stated in *Deere* was restated in *Williams Dental Co., Inc. v. Air Express International*, 824 F. Supp. 435, 443 (S.D.N.Y. 1993), *B.R.I. Coverage Corp. v. Air Canada*, 725 F. Supp. 133, 139 (E.D.N.Y. 1989), *Hartford Fire Ins. v. Trans World Airlines, Inc.*, 671 F. Supp. 693, 694 (C.D.Ca. 1987), and *Arkwright Mutual Ins. Co. v. KLM Royal Dutch Airlines*, 1995 WL 491490 (S.D.N.Y. Aug. 17, 1995). "Recovery based upon a shipment's gross weight is permitted only when damage to a portion of a shipment affects the value

of the entire shipment." *Williams Dental*, 824 F. Supp. at 443, citing *B.R.I.*, 725 F. Supp. at 139. No decision has clearly gone the other way in terms of stating the general rule.

In its supplemental brief, Federal Express proposes that *Kalok Corp. v. Circle Freight Int'l*, 24 Avi. Cas. (CCH) 17,768 (N.D.Cal. 1993), can be seen as challenging the general rule above. In *Kalok*, the packaging of a shipment containing 1,728 disk drives arrived in a crushed condition. *Kalok* then tested all of the disk drives, and found that 78 of them had sustained damage. The plaintiffs advanced several theories for assessing liability under Article 22(2) on the basis of the total weight of the shipment. The court ultimately relied upon the total weight of the shipment. The court explained: "The damage sustained was faulty transportation sufficient to call into doubt the effectiveness of the disk drives, and hence to lower the drives value. Accordingly, the weight of each disk drive must be considered in determining the Warsaw Convention limit. . ." *See id.* at 17,771.

The court used the entire weight of the shipment because it decided that the entire shipment had *actually* sustained damage. The court, therefore, did not use the affected-weight standard, but rather the package-standard in assessing liability. In responding to plaintiff's affected-weight argument, the court stated that the plaintiff "mistat[ed] the significance of *Deere* because the affected weight standard was not actually upheld by the Seventh Circuit." Having clarified that "the Circuit expressed no opinion on the merit of whether the affected-weight standard is inapplicable under United States law," the court went on to find that the facts of the case before it were distinguishable from prior affected-weight cases. "Here, the physically damaged drives were

not necessary components to the workings of the physically intact drives." *Id.* at 17,771. Federal Express is therefore correct in noting that the court expressed reservations about the significance of *Deere* in the wake of the Seventh Circuit's affirmance. The court, however, did not hold that the affected-weight standard is a faulty standard to use in assessing liability. Furthermore, there is no disagreement that when an entire shipment has been damaged, the proper quantum of damages under the Warsaw Convention would be based upon the total weight of the shipment—in this context there is no reason to question the package-weight standard.

Given that multiple district courts in the United States have stated the general rule as the affected-weight standard, and given that the convention has nationwide, indeed, world-wide applicability, this Court will follow those precedents even if they are not strictly binding authority; otherwise, the law would be in conflict over a point that is ambiguous and arguable either way and the main need is to simply have a clear rule that commerce can rely on.

After oral argument, Federal Express submitted a supplement. It pointed out what no party had yet done—that the Seventh Circuit had reviewed the *Deere* decision. (Plaintiff had neglected to point out that the Seventh Circuit had arguably questioned the lower court's basis for holding.) According to Federal Express, the district court in *Deere* mistakenly assumed that the Warsaw Convention had already incorporated the later Hague Protocol. The Hague Protocol did indeed adopt an affected-weight standard, but was not effective in this country at the time in issue. Federal Express asserts that *Deere* "was decided incorrectly pursuant to the terms of the Hague Protocol, which is not in effect in the United States" citing to 855 F.2d at 388 and 621 F.Supp. at 722.

In fact, however, neither of those pages of the opinions state that *Deere* was based on the Hague Protocol. True, on appeal the airline argued that the district judge had gotten confused over the difference between the Hague Protocol and the subsequent Montreal Agreement but the Seventh Circuit refused to reach the argument because the airline had not raised the issue below. The Seventh Circuit affirmed that aspect of the appeal. Accordingly, this Court takes *Deere* at face value as a construction of the Warsaw Convention itself.

To bring this to a point, the Court is going to follow *Deere* and its affected-weight rule. If the damage sustained in part rendered the entire system inoperable, the proper weight to be considered under Article 22(2) of the Warsaw Convention is the total weight of the shipment.

In the future this problem will largely be solved by the Montreal Protocol No. 4, which adopts the affected-value standard of *Deere*. The judgment herein is thus consistent with the future law in this area, at least as far as concerns Warsaw Convention cases in which the countries involved have signed the Protocol.[2]

Having held that the Warsaw Convention employs an affected-value standard, it follows that Warsaw Convention liability cannot be reduced by contract. Article 23 is very clear in its prohibitions of any diminution of the level of compensation available under the convention below that set by the limitation-on-liability provision. Article 23 states:

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[2] The Montreal Protocol amends the Warsaw Convention, as amended by the Hague Protocol (1955). It interprets limits upon liability as based upon total weight. The Montreal Protocol is not applicable to the present case, as it was only effective as of 1999 and Japan is not a signatory. *See Montreal Protocol No. 4*, Signed at Montreal on September 25, 1975.

> [a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Warsaw Convention, Art. 23.

Turning to the next issue, the parties argue about what is meant by "affects the whole shipment." In *Deere* the value of the shipment was affected by the loss of the use of the computer for a period of time.

This case is like *Deere*. Motorola claims that the entire shipment containing the Cellular Base Station system was rendered inoperable by the damage to the Common Control Frame (Koepke Decl. ¶ 6). During the six weeks that it took to get the replacements, Motorola could not begin to install the Cellular Base Station system (Koepke Decl. ¶ 7). Motorola suggests, therefore, that damage sustained to the part of the cargo affected the value of the whole.

There remain factual questions with regard to exactly what Motorola property was damaged and for how long. If it is shown at trial that the damaged parts caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the weight that will be considered under Article 22(2) is the total weight of the shipment.

There Are Triable Issues of Material Fact

Summary judgment cannot be granted to plaintiffs because, viewing the evidence in a light most favorable to the non-moving parties, there is a genuine issue of material fact. Motorola claims that a Common Control Frame and the control cards that were located within the

frame were severely damaged (Sawada Decl. ¶4). The Sawada declaration is competent evidence as it is based upon personal knowledge. Kuehne & Nagel, however, offer the deposition testimony of Koepke as proof that Motorola's claim of damage is inaccurate (Tede Decl. Exh. "A"). The examiner refers Koepke to a shipping "manifest" that was either prepared by Motorola, by RSI (the packaging agency hired by Motorola), or by the manufacturer of the Cellular Base Station system. The "manifest" said that certain items had been excluded from the shipment. These items, however, were included among the cargo that Motorola had claimed was damaged during transport (Koepke Dep. 25: 1-25 and 26:1-5). Keopke is an agent of Motorola and was sent in response to Federal Express's deposition request for the "person most knowledgeable" within Motorola with regard to this shipment (K&N Opp. para. 1, at 6). The deposition is admissible as evidence under the Federal Rules of Evidence as an admission of a party-opponent. There is, therefore, an issue of fact regarding the meaning of this "manifest," who prepared it and what information it contains, *i.e.*, what exactly was damaged and how did it relate to the overall system. This issue is material to the outcome of this litigation, and is to be resolved at trial.

Notice

Federal Express argues both as an affirmative defense and as a basis on which to grant summary judgment in its favor that it did not receive proper notice of the damage to Motorola's property. Federal Express claims that it only became aware of this claim on March 31, 1998, when it received a claim letter from plaintiff's counsel (Opp. 11-12).

In brief, Kuehne & Nagel is shown at trial to have been the agent of Federal Express, then the requirement of notice under the convention is satisfied. Federal Express cannot hold Kuehne & Nagel out as its agent and then disclaim notice when notice was given to the agent. Furthermore, even if Kuehne & Nagel is not found to be Federal Express's agent, if Federal Express received the "Preliminary Notice of Claim," then the notice requirement is similarly satisfied. Finally, there are triable issues of fact regarding the adequacy of the damage notation on the delivery order (Kuehne & Nagel's house waybill). These fact issues will have to be resolved at trial.

If Kuehne & Nagel Was the Agent of Federal Express, Then Notice to Kuehne & Nagel Is Notice To Federal Express

Motorola claims that Kuehne & Nagel was the agent of Federal Express, Kuehne & Nagel does not dispute that it acted as Federal Express's agent in executing Federal Express's waybill. Kuehne & Nagel also does not dispute that it received timely notice of damage. Because of this, Motorola contends that notice to Kuehne & Nagel satisfies the notice requirement as to Federal Express.

In response, Federal Express maintains that this claim is both logically inconsistent and irrelevant. Federal Express suggests that Motorola is attempting to assign Kuehne & Nagel various and contradictory roles, because Motorola has suggested that Kuehne & Nagel acted as its agent for the purpose of standing, and acted as the agent of Federal Express for the purpose of satisfying the notice requirement.

The Court views this as counterfeit logic. If Kuehne & Nagel was installed by Federal Express as its agent, there is no inconsistency with Kuehne & Nagel being the party who was responsible for interacting with Motorola on one end and Federal Express on the other. In that case, the installation of Kuehne & Nagel as Federal Express's agent does not diminish Federal Express's responsibility to the shipper. If agency is shown, the receipt of notice by Kuehne & Nagel would be effective as to Federal Express irrespective of any other proofs of notice proffered by the plaintiffs.

It seems plausible to the Court that an agency relationship may have existed, given that Federal Express's master waybill lists Kuehne & Nagel as the "issuing carrier's agent." At a minimum, there is a triable issue of fact as to the nature of the relationship between Kuehne & Nagel and Federal Express. At trial, the Court will be interested to see any direct proof of Federal Express's designation of Kuehne & Nagel as an agent.

"Preliminary Notice of Claim"

Notice may be valid, moreover, even if Kuehne & Nagel was not the agent of Federal Express. Article 26 of the Warsaw Convention outlines the proper form that notice must take in order for the carrier to be held liable. "In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within . . . 7 days of receipt in the case of goods." Warsaw Convention Art. 26(2). All complaints must be in writing. Warsaw Convention Art. 26(3).

Federal Express makes two arguments with regard to notice. First, the "Preliminary Notice of Claim" which Kuehne & Nagel says was sent on July 18, 1997, was never sent, and even if it was sent, it was ineffective.

Second, the notation of damage on the front of Kuehne & Nagel's house waybill (delivery order) was ineffective. The court finds on the legal questions posed, that both the "Preliminary Notice of Claim" and the damage notation would be satisfactory forms of notice under the Warsaw Convention. The factual questions, with regard to the actual delivery of these documents and the adequacy of the translation of the damage notation, however, are questions to be resolved at trial.

Federal Express suggests that the "Preliminary Notice of Claim" which Motorola claims to have sent to Federal Express two days after the cargo was delivered is legally insufficient because no evidence has been presented setting forth who issued and received the notice, nor where and when the notice was given. (FX's Opp. 11). Federal Express says that document also failed to list the air waybill information (*id.* at 12).

The Court finds that the "Preliminary Notice of Claim" is satisfactory notice even though it is not detailed with precision. It is dated July 18, 1997, which is within the seven-day notice period required by the convention. It has the consignee's name on it, and was addressed to Federal Express. Finally, it said that there had been damage, delay or loss to the cargo, and reserved the right to file a claim when the details were ascertained (Ginger Decl., Exh. "D"). This notice, though brief, should have alerted Federal Express that there was a problem with the shipment of this property, and should have sparked an investigation.

Federal Express suggests that this was a blanket notice that Kuehne & Nagel gives out to all carriers it deals with, and as such, is tantamount to no notice at all. This suggestion is based upon a letter written by Nobo Ogawa to David McLeod, both of Kuehne & Nagel (Ginger Decl. Exh. "D"). In reviewing the letter, there are a

range of possible interpretations that can be given its language, especially when read in conjunction with the e-mail that the message above was responding to. Speculation as to the meaning of the e-mail does not create an issue in regard to the notice requirement. Even if sending out a preliminary claim was standard practice for Kuehne & Nagel (which it denies), this would not make the notice legally insufficient.

Although the summary judgment record seems to indicate that Federal Express received the "Preliminary Notice of Claim," Federal Express has affirmatively indicated that it did not receive notice and the items of proof of notification are indirect and inconclusive. For that reason a triable issue of fact exists.

Notation on Kuehne & Nagel's Waybill (Delivery Order)

Motorola claims that Federal Express was also made aware of the damage to its cargo through a notation made by Kuehne & Nagel on the front of its house air waybill (delivery order), upon receipt of the cargo from Federal Express (Reply Br. 3).

The notation of the front of the Kuehne & Nagel's house waybill is legally sufficient because Article 26(3) provides that notice to be made "upon the document of transportation or by separate notice in writing . . ." In this case, the notice was made upon a document of transportation. The document was produced by Federal Express in this action, and as such is admissible as a party admission.

There are however, several issues of fact regarding this notation. First, Motorola suggests that this notice was received by IACT, which it claims is a representative of Federal Express. The claim of agency between IACT and Federal Express is unsubstantiated. Second,

there is a question of fact regarding what the notation actually said. The notation has been translated from Japanese to English, but is has not been certified as an accurate translation, and it is unclear who provided the translation. There are, therefore, triable issues of fact as to the relationship between IACT and Federal Express and as to the adequacy of the translation of the damage notation.

Standing

As explained above, Motorola claims that Kuehne & Nagel was the agent of Federal Express. The Court holds that if Kuehne & Nagel acted as Federal Express's agent, then Motorola has standing to bring this action against both defendants.

Under the Warsaw Convention, the "consignor" and the "consignee" have a right of action . . . against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place." Warsaw Convention Art. 30(3). Federal Express's air waybill lists Kuehne & Nagel as the consignee, and Kuehne & Nagel, Japan, Ltd. as the consignor of this cargo. Federal Express argues that Article 30(3) dictates that only the consignee or the consignor listed on the air waybill may bring an action of this type (Opp. 14-15). In its view, the plaintiffs lack standing because they were not listed in either position.

Notwithstanding its absence on Federal Express's air waybill, Motorola may have standing to maintain this action against Federal Express. This is because it may be shown at trial that Federal Express installed Kuehne & Nagel as its agent. If the defendants had an agency relationship, then Motorola's contract with Kuehne & Nagel was effectively an agreement with Federal Express and Federal Express will not be able to immunize itself from

suit through the placement of Kuehne & Nagel in the position of "consignor."

Lastly, if Motorola is found to have standing, then standing will also be conferred upon Fireman's Fund, as its successor-in-interest, through its subrogation agreement with Motorola (FX Opp., Exh. "D" at 11). See *B.R.I. Coverage Corp. v. Air Canada*, 725 F. Supp. 133, 136 (E.D.N.Y. 1989).

At Least Some Damage to Plaintiff's Property Was Sustained During Air Transportation and While the Cargo Was Under the Care, Custody and Control of Federal Express

Kuehne & Nagel made a motion for partial summary judgment stating that the damage that did occur in this case happened during air transportation as defined by the Warsaw Convention, while the cargo was under the care, custody and control of Federal Express. It is undisputed that cargo was being transported under a contract for air transport. The "clean" air waybills are evidence of the apparent good condition of the cargo until after the transportation of the cargo began. Though Motorola and Kuehne & Nagel claim that damage was noted upon receipt of property by Kuehne & Nagel at the airport in Japan, as explained above, there are questions of fact regarding the reliability of this evidence. Damage was confirmed upon receipt of the cargo by Motorola (Sawada Decl. ¶ 4). Since no parties timely opposed this motion, the Court holds that the damage in this case was sustained during the course of air transportation as defined by the Warsaw Convention, and while the cargo was under the care, custody and control of Federal Express. As explained above, the factual issue of the scope of damage still requires resolution.

CONCLUSION

The Warsaw Convention applies to this case. Under the Article 22(2) of the convention, if the value of the entire shipment was affected by the damage that was done to a portion of the equipment, then the limit on liability is based upon the total weight of Motorola's cargo.

Neither plaintiffs nor defendant Federal Express is entitled to summary judgment as there are triable issues of material fact which must still be resolved with regard to whether the overall shipment was so affected, the scope of the damage done to Motorola's property, the receipt of notice, and as to the existence of an agency relationship between Federal Express and Kuehne & Nagel.

Though there remains a factual issue as to exactly what Motorola property was damaged, it is clear that at least some damage was sustained to the Cellular Base Station system, and this damage occurred "during air transportation" as defined by the Convention, and while the property was under the care, custody and control of Federal Express. For this reason, Kuehne & Nagel's motion for partial summary judgment is granted. Lastly, Kuehne & Nagel cross claim for equitable and comparative indemnity and contribution from Federal Express is postponed until the completion of trial.

IT IS SO ORDERED.

Dated: September 25, 2000

/S/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C99-03659 WHA
Filed October 11, 2000

MOTOROLA, INC., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Plaintiffs,

—VS.—

FEDERAL EXPRESS, a corporation; KUEHNE & NAGEL, INC., a corporation, and DOES ONE through TEN, inclusive,

Defendants.

Trial Date: October 18, 2000
Time: 2:00 p.m.
Place: Courtroom 9, 19th Floor
Judge: Hon. William Alsup

JOINT (PROPOSED) FINAL PRETRIAL ORDER

Pursuant to the Court's order at the pre-trial conference held on September 26, 2000, the parties hereby submit the following revised joint final pretrial order to conform with the Court's September 25, 2000 Order Granting in part and Denying in part the parties' motions and cross-motions for summary judgment/adjudication (hereinafter "Order").

A. *Brief Description of the Claims & Defenses To Be Tried*

This case involves damage to Motorola's Cellular Base Station system during transportation as more fully set forth in the Court's Statement at page 2:15 of its Order. The issues remaining for resolution in this case are:

1. Exactly what parts of the shipment were damaged.
2. Whether the damage affected the value of the entire system.
3. Whether Federal Express ("Fed Ex") received timely notice of claim pursuant to Article 26.
4. The nature of the relationship between Kuehne & Nagel ("K&N") and Fed Ex with respect to

the shipment, Motorola's standing to sue Fed Ex and notice of damage.

5. The meaning of the Japanese hand-written notation on the front of K & N's house waybill (delivery order).

6. Whether K&N sent the "Preliminary Notice of Claim" to Fed Ex on July 18, 1997.

7. Whether plaintiffs possess standing to pursue their action against Fed Ex pursuant to Article 30.

8. The amount of damages sustained by plaintiffs.

9. Whether either defendant can limit its liability to plaintiffs and, if so, to what amount.

10. Whether the shipment was properly packaged.

11. Whether Fed Ex is liable to K&N for indemnity for any damages awarded to plaintiffs and for attorney fees and costs incurred by K&N in defense of this action.

B. *STATEMENT OF ALL RELIEF SOUGHT*

Plaintiffs seek damages against both defendants, excluding costs and interest, of $462,065.60. If the Court finds defendants can avail themselves of Article 22's limitation provision, plaintiffs then seek damages in the amount of $244,040.00.

Defendant Fed Ex seeks a determination that it has no liability to either plaintiff or K&N based on Article 26's notice requirement. Fed Ex also seeks a determination that plaintiffs do not possess standing. Both defendants seek a determination that they are not liable for the damages, however, if found liable, both defendants then seek

a determination that their liability is limited to $13,680. Defendant K&N also seeks a determination that Fed Ex owes K&N equitable indemnity for any damages awarded to plaintiffs and for attorney fees and costs incurred by K&N in defense of this action.

C. *STIPULATED FACTS*

The parties hereby stipulate and agree to the following facts:

1. Motorola, Inc. is now and at all times material herein was a corporation duly organized and existing according to law.

2. Fireman's Fund Insurance Company is now and at all times material herein was a corporation duly organized and existing according to law and the insurer of the Cellular Base Station System (hereinafter "the shipment").

3. Motorola hired defendant Kuehne and Nagel ("K&N") to transport the shipment via air from Dallas, Texas to Tokyo, Japan.

4. K&N arranged for Fed Ex to transport the shipment by air from Dallas, Texas to Tokyo, Japan.

5. Motorola hired RSI to package the shipment.

6. RSI packaged the shipment and arranged for the shipment to be transported to Fed Ex.

7. Fed Ex received the shipment on July 8, 1997 at the airport in Dallas, Texas.

8. Fed Ex issued air waybill no. 023 9052 3926 and K&N issued air waybill no. 67701336 for the shipment on July 8, 1997.

9. K&N executed Fed Ex's waybill on behalf of Fed Ex.

10. When Fed Ex and K&N issued the air waybills on July 8, 1997 in Dallas, Texas, the air waybills were issued "clean", i.e. there was no notation of any damage to the shipment.

11. Fed Ex transported the shipment by air from Dallas, Texas to Tokyo, Japan.

12. On July 16, 1997, K&N Japan accepted delivery of the shipment at the airport in Tokyo from Fed Ex.

13. K&N delivered the shipment to Nippon Motorola Ltd.

14. On August 15, 1997, K. Inoue, on behalf of Nippon Motorola, conducted a survey of the shipment in Japan.

15. The Cellular Base Station System cannot operate without the common control frame and the cards within it.

16. Motorola submitted a claim to plaintiff Fireman's Fund Insurance Company in the amount of $459,330.70 for the alleged damage to the shipment (the "claim").

17. Fireman's Fund paid Motorola $434,330.70 for the claim.

18. Fireman's Fund paid the surveyor $2,734.90 for his fees related to the claim.

19. The shipment weighed 12,204 kilograms and the individual components which plaintiffs alleged were damaged weighed 680 kilograms.

D. *FACTUAL ISSUES RESOLVED BY SUMMARY ADJUDICATION ORDER*

1. Damage to the shipment occurred during the course of air transportation while under the care, custody and control of Fed Ex (Order 13:27-14:3).

2. K & N received timely notice of damage from Motorola (Order 9:26-27).

E. *LEGAL ISSUES RESOLVED BY SUMMARY ADJUDICATION ORDER*

1. The movement of the system was "transport of goods" as defined by the Warsaw Convention Art. 1(2). Both Federal Express and Kuehne & Nagel are subject to carrier liability under the convention (Order 3:19-22).

2. If it is shown at trial that the damage to the shipment rendered the entire system inoperable and caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the proper weight to be considered under Article 22(2) of the Warsaw Convention is the total weight of the shipment (Order 7:12-14; 8:13-16).

F. *FACTUAL ISSUES TO BE TRIED*

1. Whether K&N made note of damage on the delivery order.

2. Whether K&N sent preliminary notice of claim to Fed Ex within 7 days of receipt of the shipment on July 16, 1997.

3. Exactly what parts of the shipment were damaged when received by Motorola and whether the claimed damage affected the value of the entire shipment by rendering the entire system inoperable and causing the construction or operation of the system to be delayed for a period of several weeks.

4. Whether Motorola replaced the damage components.

5. Whether the replacement costs for the damaged components, including freight and insurance, was $459,330.70.

6. Whether plaintiffs incurred damages of $462,065.60 resulting from the damage to the system's common control frame and the cards within it.

7. Whether the shipment was properly packaged.

8. Who owned the shipment that is the subject of this action.

9. The amount of attorneys' fees and costs incurred by K&N in defense against the claims asserted by the plaintiffs (which, pursuant to L.R. 54-5 is raised by post-judgment motion, if pertinent).

10. *Contentions*: K&N contends that exactly what was shipped by Motorola is a factual issue to be tried. Plaintiffs contend that proof of exactly what parts were damaged-renders proof of what was shipped unnecessary.

G. *LEGAL ISSUES TO BE TRIED*

1. Whether Fed Ex is liable to K&N and, if so, the extent of that liability.

2. Whether Fed Ex has waived the "real party in interest" defense to Motorola's claim.

3. *Contentions:* K&N contends that a legal issue to be tried is whether Fed Ex is liable to plaintiffs, and if so, the extent of that liability. Plaintiffs contend that the Court's ruling on motions for summary adjudication resolved the issue of K&N's legal liability to plaintiffs for damage to the shipment subject only to resolution at trial of the factual issue set forth in factual issue # 3 above.

H. *JOINT EXHIBIT LIST*

The parties will file separately a joint exhibit list as follows:

1. Exhibits which the parties have stipulated are admissible are listed in the attached Joint Exhibit list as Exhibits 1—.

2. Plaintiffs' exhibits are listed beginning at Exhibit # 50.

3. K&N's exhibits are listed beginning at Exhibit # 100.

4. Fed Ex's exhibits are listed beginning at Exhibit # 200.

I. *WITNESS STATEMENTS*

The parties' witness statements have been previously filed separately from this document. However, the parties incorporate said witness lists by reference into this proposed order.

I. *PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW*

The parties previously filed proposed findings of fact and conclusions of law prior to the Court's rulings on the motions for summary adjudication and will file amended versions no later than October 18, 2000.

K. *TRIAL BRIEFS*

The parties previously filed trial briefs in this matter.

Dated: October 11, 2000 GIBSON & ROBB

By STANLEY L. GIBSON
Stanley L. Gibson
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MOTOROLA and
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Dated: October 11, 2000 FLYNN, DELICH & WISE

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Kuehne & Nagel, Inc.

Dated: October 11, 2000 FEDERAL EXPRESS CORPORATION

By J. RUSSELL PHILLIPS
J. Russell Phillips
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FEDERAL EXPRESS CORPORATION

IT IS ORDERED.

Dated: October __, 2000

Hon. William H. Aslup